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Supp of Ct to 3d Supp Transcript

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1902~~ 1903.

No. ~~117~~ 145.

THE UNITED STATES, PETITIONER,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY AND THE NORTHERN PACIFIC RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

CERTIFICATE FILED OCTOBER 20, 1902.
CERTIORARI AND RETURN FILED NOVEMBER 17, 1902.
(18705.)

18128

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 477.

THE UNITED STATES, PETITIONER,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY AND THE NORTHERN PACIFIC RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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In the United States Circuit Court of Appeals, Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY et al.,
Appellees.

Order Extending Time to Docket Cause.

It appearing that the time heretofore allowed for the filing of the transcript on appeal in the above-entitled cause is insufficient for the preparation of the record on said appeal, it is therefore

Ordered that said time be, and the same hereby is, extended sixty days from and after this date.

February 19, 1902.

C. H. HANFORD,
Judge.

[Endorsed]: No. 822. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Northern Pacific Railway Co. et al., Appellees. Order Extending Time to File Transcript on Appeal. Filed February 24, 1902. F. D. Monckton, Clerk.

In the Circuit Court of the United States for the District of Washington, Western Division.

July Term, 1897.

Be it remembered that on the 27th day of July, 1897, there was duly filed in said Circuit Court of the United States for the District of Washington, Western Division, a complaint, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, and the NORTHERN PACIFIC RAILWAY COMPANY,
Defendants.

Complaint.

To the Honorable Judges of the Circuit Court of the United States of America, for the District of Washington, in Chancery sitting:

Your orators, the United States of America, bring this, their bill of complaint, against the Northern Pacific Railroad Company and the Northern Pacific Railway Company, defendants, and thereupon your orators complain

of the said defendants, and respectfully show unto your Honors:

I.

That on the 24th day of May, A. D. 1895, and on the 27th day of May, A. D. 1895, and at all times prior thereto, your orators were, and still are, the owners in fee of the lands situated in the Western Division of the District of Washington, and more particularly described as follows:

SE ¼ SE ¼, Sec. 1, T. 3 N. R. 1 E., containing 40 acres; NE ¼, Sec. 25, T. 3 N. R. 1 E., containing 160 acres; SW ¼, Sec. 1, T. 2 N. R. 2 E., containing 160 acres; NW ¼ NE ¼, Sec. 3, T. 2 N. R. 2 E., containing 39.60 acres; NE ¼ NW ¼, Sec. 3, T. 2 N. R. 2 E., containing 39.34 acres; S ½ NE ¼, Sec. 7, T. 2 N., R. 2 E., containing 80 acres; E ½ NW ¼, Sec. 7, T. 2 N. R. 2 E., containing 80 acres; Lots 3, 4, 5 and 6, Sec. 11, T. 2 N. R. 2 E., containing 113.24 acres; Lot 1, Sec. 21, T. 2 N., R. 2 E., containing 13.21 acres; W ½ NW ¼, Sec. 23, T. 2 N. R. 2 E., containing 80 acres; SE ¼ SW ¼, Sec. 23, T. 2 N., R. 2 E., containing 40 acres; SE ¼, Sec. 23, T. 2 N., R. 2 E., containing 160 acres; S ½ NE ¼, Sec. 25, T. 2 N., R. 2 E., containing 80 acres; NW ¼, Sec. 25, T. 2 N., R. 2 E., containing 160 acres; N ½ SW ¼, Sec. 25, T. 2 N., R. 2 E., containing 80 acres; SE ¼, Sec. 25, T. 2 N., R. 2 E., containing 160 acres; N. ½, SE ¼, Sec. 27, T. 2 N., R. 2 E., containing 80 acres; W ½ NW ¼, Sec. 5, T. 3 N., R. 2 E., containing 78.42 acres; SW ¼ NW ¼, Sec. 7, T. 3 N., R. 2 E., containing 41.18 acres; SE ¼ SE ¼, Sec. 9, T. 3 N., R. 2 E., containing 40 acres; SE ¼ NE ¼, Sec. 11, T. 3 N., R. 2 E., containing 40 acres; E ½ SE ¼, Sec. 17,

T. 3 N., R. 2 E., containing 80 acres; SW ¼ SW ¼, Sec. 19, T. 3 N., R. 2 E., containing 41.68 acres; NE ¼ NE ¼, Sec. 29, T. 3 N., R. 2 E., containing 40 acres; NW ¼ NW ¼, Sec. 31, T. 3 N., R. 2 E., containing 42.49 acres; NW ¼ NE ¼, Sec. 33, T. 3 N., R. 2 E., containing 40 acres; NE ¼, NW ¼, Sec. 33, T. 3 N., R. 2 E., containing 40 acres; E ½ SE ¼, Sec. 33, T. 3 N., R. 2 E., containing 80 acres; Lots 1, 2, 3, 4, Sec. 33, T. 3 N., R. 2 E., containing 93.59 acres; NE ¼, Sec. 1, T. 4 N., R. 2 E., containing 127.22 acres; NW ¼, Sec. 1, T. 4 N., R. 2 E., containing 137.86 acres; SE ¼, Sec. 1, T. 4 N., R. 2 E., containing 160 acres; All of Sec. 3, T. 4 N., R. 2 E., containing 604.10 acres; NW ¼ NE ¼, Sec. 5, T. 4 N., R. 2 E., containing 35.58 acres; SW ¼ NE ¼, Sec. 5, T. 4 N., R. 2 E., containing 40 acres; NE ¼ NW ¼, Sec. 5, T. 4 N., R. 2 E., containing 36.03 acres; S. ½ NW ¼, Sec. 5, T. 4 N., R. 2 E., containing 80 acres; SW ¼, Sec. 5, T. 4 N., R. 2 E., containing 160 acres; S ½ SE ¼, Sec. 5, T. 4 N., R. 2 E., containing 80 acres; N ½ NE ¼, Sec. 7, T. 4 N., R. 2 E., containing 80 acres; E ½ NW ¼, Sec. 7, T. 4 N., R. 2 E., containing 80 acres; E ½ SW ¼, Sec. 7, T. 4 N., R. 2 E., containing 80 acres; N ½ NW ¼, Sec. 9, T. 4 N., R. 2 E., containing 80 acres; SE ¼ NW ¼, Sec. 9, T. 4 N., R. 2 E., containing 40 acres; SW ¼, Sec. 9, T. 4 N., R. 2 E., containing 160 acres; S ½, SE ¼, Sec. 11, T. 4 N., R. 2 E., containing 80 acres; N ½ NE ¼, Sec. 13, T. 4 N., R. 2 E., containing 80 acres; SW ¼, NE ¼, Sec. 13, T. 4 N., R. 2 E., containing 40 acres; NW ¼, Sec. 13, T. 4 N., R. 2 E., containing 160 acres; NW ¼ SE ¼, Sec. 13, T. 4 N., R. 2 E., containing 40 acres; NE ¼, Sec. 17, T. 4 N., R. 2 E., containing 160 acres; NW ¼, SE ¼, Sec. 17,

T. 4 N., R. 2 E., containing 80 acres; SW ¼, SE ¼, Sec. 17, T. 4 N., R. 2 E., containing 40 acres; S ½ NW ¼, Sec. 19, T. 4 N., R. 2 E., containing 77.52 acres; SW ¼, Sec. 19, T. 4 N., R. 2 E., containing 155.28 acres; SE ¼, Sec. 19, T. 4 N., R. 2 E., containing 160 acres; NE ¼, Sec. 21, T. 4 N., R. 2 E., containing 160 acres; S ½ NW ¼, Sec. 21, T. 4 N., R. 2 E., containing 80 acres; SE ¼, Sec. 21, T. 4 N., R. 2 E., containing 160 acres; NW ¼ NE ¼, Sec. 23, T. 4 N., R. 2 E., containing 40 acres; NW ¼, SW¼, Sec. 23, T. 4 N., R. 2 E., containing 40 acres; S ½ NE ¼, Sec. 25, T. 4 N., R. 2 E., containing 80 acres; NW ¼ NW ¼, Sec. 25, T. 4 N., R. 2 E., containing 40 acres; N ½ SE ¼, Sec. 25, T. 4 N., R. 2 E, containing 80 acres; SE ¼ SE ¼, Sec. 25, T. 4 N., R. 2 E., containing 40 acres; N ½ NW ¼, Sec. 27, T. 4 N., R. 2 E., containing 80 acres; SW ¼ SE ¼, Sec. 29, T. 4 N., R. 2 E., containing 40 acres; E. ½ SE ¼, Sec. 31, T. 4 N., R. 2 E., containing 80 acres; SE ¼, NW ¼, Sec. 33, T. 4 N., R. 2 E., containing 40 acres; NE ¼, Sec. 1, T. 5 N., R. 2 E., containing 160.88 acres; NW ¼, Sec. 1, T. 5 N., R. 2 E., containing 162 acres; S ½ SE ¼, Sec. 1, T. 5 N., R. 2 E., containing 80 acres; NE ¼, SE ¼, Sec. 1, T. 5 N., R. 2 E., containing 40 acres; Lot 1, Sec. 3, T. 5 N., R. 2 E., containing 41.36 acres; Lot 2, Sec. 3, T. 5 N., R. 2 E., containing 41.20 acres; Lot 3, Sec. 3, T. 5 N., R. 2 E., containing 41.22 acres; Lot 4, Sec. 3, T. 5 N., R. 2 E., containing 41.15 acres; S ½, Sec. 3, T. 5 N., R. 2 E., containing 80 acres; SE ¼, Sec. 3, T. 5 N., R. 2 E., containing 160 acres; S ½ NE ¼, Sec. 5, T. 5 N., R. 2 E., containing 80 acres; Lots 1 and 2, Sec. 5, T. 5 N., R. 2 E., containing 82.77 acres; NE ¼, Sec. 13, T. 5 N., R. 2 E., containing 160

acres; NW ¼, Sec. 13, T. 5 N., R. 2 E., containing 160 acres; SE ¼, Sec. 13, T. 5 N., R. 2 E., containing 160 acres; SW ¼, Sec. 13, T. 5 N., R. 2 E., containing 160 acres; N ½ NW ¼, Sec. 21, T. 5 N., R. 2 E., containing 80 acres; SW ¼, NW ¼, Sec. 21, T. 5 N., R. 2 E., containing 40 acres; SE ¼, SW ¼, Sec. 25, T. 5 N., R. 2 E., containing 40 acres; SE ¼, Sec. 25, T. 5 N., R. 2 E., containing 160 acres; NE ¼, Sec. 27, T. 5 N., R. 2 E., containing 160 acres; E ½ NW ¼, Sec. 27, T. 5 N., R. 2 E., containing 80 acres; SW ¼ NW ¼, Sec. 27, T. 5 N., R. 2 E., containing 40 acres; SW ¼, Sec. 27, T. 5. N., R. 2. E., containing 160 acres; W. ½, SE ¼, Sec. 27, T. 5 N., R. 2 E., containing 80 acres; NE ¼ SE ¼, Sec. 27, T. 5. N., R. 2 E., containing 40 acres; E. ½ SW ¼, Sec. 31, T. 5 N., R. 2 E., containing 80 acres; NE ¼, Sec. 33, T. 5 N., R. 2 E., containing 160 acres; SE ¼, Sec. 33, T. 5 N., R. 2 E., containing 160 acres; SW ¼, Sec. 33, T. 5 N., R. 2 E., containing 160 acres; NE ¼, Sec. 35, T. 5 N., R. 2 E., containing 160 acres; E ½ NW ¼, Sec. 35, T. 5 N., R. 2 E., containing 80 acres; E ½ SW ¼, Sec. 35, T. 5 N., R. 2 E., containing 80 acres; SE ¼, Sec. 35, T. 5 N., R. 2 E., containing 160 acres; NE ¼, NW ¼, Sec. 3, T. 1 N., R. 3 E., containing 38.32 acres; NW ¼ NW ¼, Sec. 3, T. 1 N., R. 3 E., containing 38.16 acres; SW ¼, Sec. 3, T. 2 N., R. 3 E., containing 160 acres; NW ¼, NE ¼, Sec. 5, T. 2 N., R. 3 E., containing 41.39 acres; NE ¼ NW ¼, Sec. 5, T. 2 N., R. 3 E., containing 41.78 acres; NW ¼ NW ¼, Sec. 5, T 2 N., R. 3 E., containing 42.17 acres; N ½ NW ¼, Sec. 9, T. 2 N., R. 3 E., containing 80 acres; N ½ SW ¼, Sec. 9, T. 2 N., R. 3 E., containing 80 acres; SW ¼ SW ¼, Sec. 9, T. 2 N., R. 3 E., containing

40 acres; NE ¼, Sec. 13, T. 2 N., R. 3 E., containing 160 acres; NW ¼, Sec. 13, T. 2 N., R. 3 E., containing 160 acres; N ½ SW ¼, Sec. 13, T. 2 N., R. 3 E., containing 80 acres; SE ¼ SW ¼, Sec. 13, T. 2 N., R. 3 E., containing 40 acres; N ½ SE¼, Sec. 13, T. 2 N., R. 3 E., containing 80 acres; SE ¼ SE¼, Sec. 13, T. 2 N., R. 3 E., containing 40 acres; SW ¼ NW ¼, Sec. 15, T. 2 N., R. 3 E., containing 40 acres; W ½ SW ¼, Sec. 15, T. 2 N., R. 3 E., containing 80 acres; S ½ NW ¼, Sec. 19, T. 2 N., R. 3 E., containing 73.76 acres; SW ¼, Sec. 19, T. 2 N., R. 3 E., containing 152.28 acres; W ½ SE ¼, Sec. 19, T. 2 N., R. 3 E., containing 80.80 acres; SW ¼ NE ¼, Sec. 19, T. 2 N., R. 3 E., containing 40.40 acres; Lot 1, Sec. 19, T. 2 N., R. 3 E., containing 39.44 acres; NE ¼ NW ¼, Sec. 21, T. 2 N., R. 3 E., containing 40 acres; Lot 5, Sec. 21, T. 2 N., R. 3 E., containing 14.80 acres; SE ¼ NE ¼, Sec. 25, T. 2 N., R. 3 E., containing 40 acres; Lots 1, 3 and 4, Sec. 25, T. 2 N., R. 3 E., containing 54.28 acres; NE ¼ NW ¼, Sec. 27, T. 2 N., R. 3 E., containing 40 acres; NE ¼ NE ¼, Sec. 31, T. 2 N., R. 3 E., containing 40 acres; NW ¼ NE ¼, Sec. 33, T. 2 N., R. 3 E., containing 40 acres; NE ¼ NW ¼, Sec. 33, T. 2 N., R. 3 E., containing 40 acres; NE ¼, Sec. 35, T. 2 N., R. 3 E., containing 160 acres; E ½ NW ¼, Sec. 35, T. 2 N., R. 3 E., containing 80 acres; NE ¼ SW ¼, Sec. 35, T. 2 N., R. 3 E., containing 40 acres; NW ¼ SE ¼, Sec. 35, T. 2 N., R. 3 E., containing 40 acres; S ½ NW ¼, Sec. 3, T. 3 N., R. 3 E., containing 80 acres; Lots 3 and 4, Sec. 3, T. 3 N., R. 3 E., containing 82.77 acres; NE ¼, Sec. 5, T. 3 N., R. 3 E., containing 162.19 acres; NW ¼, Sec. 5, T. 3 N., R. 3 E., containing 162.95 acres; N ½ SW ¼, Sec.

5, T. 3 N., R. 3 E., containing 80 acres; N ½ SE ¼, Sec. 5, T. 3 N., R. 3 E., containing 80 acres; NE ¼ Sec. 9, T. 3 N., R. 3 E., containing 160 acres; SW ¼, Sec. 9, T. 3 N., R. 3 E., containing 160 acres; SW ¼ S W ¼, Sec. 11, T. 3 N., R. 3 E., containing 40 acres; SW ¼ SW ¼, Sec. 13, T. 3 N., R. 3 E., containing 40 acres; All of Sec 15, T. 3 N., R. 3 E., containing 640 acres; NE ¼ NE ¼, Sec. 19, T. 3 N., R. 3 E., containing 40 acres; E ½ SE ¼, Sec. 19, T. 3 N., R. 3 E., containing 80 acres; All of Sec. 23, T. 3 N., R. 3 E., containing 640 acres; All of Sec. 25, T. 3 N., R. 3 E., containing 640 acres: All of Sec. 27, T. 3 N., R. 3 E., containing 640 acres; NW ¼, Sec. 29, T. 3 N., R. 3 E., containing 160 acres; SW ¼, Sec. 29, T. 3 N., R. 3 E., containing 160 acres; NE ¼, Sec. 33, T. 3 N., R. 3 E., containing 160 acres; W ½ NW ¼, Sec. 33, T. 3 N., R. 3 E., containing 80 acres; SE ¼ NW ¼, Sec. 33, T. 3 N., R. 3 E., containing 40 acres; N ½ SW ¼, Sec. 33, T. 3 N., R. 3 E., containing 80 acres; N ½ SE ¼, Sec. 33, T. 3 N., R. 3 E., containing 80 acres; SE ¼ SE ¼ Sec. 33, T. 3 N., R. 3 E., containing 40 acres, All of Sec. 35, T. 3 N., R. 3 E., containing 640 acres; N ½ NE ¼ Sec. 3, T. 4 N., R. 3 E., containing 59.01 acres; NW ¼ NW ¼, Sec. 3, T. 4 N., R. 3 E., containing 28.33 acres; S ½ NW ¼, Sec. 3, T. 4 N., R. 3 E., containing 80 acres; SW ¼, Sec. 3, T. 4 N., R. 3 E., containing 160 acres; SE ¼, Sec. 3, T. 4 N., R. 3 E., containing 160 acres; NE ¼ NE ¼, Sec. 5, T 4 N., R. 3 E., containing 28.07 acres; S ½ NE¼, Sec. 5 T. 4 N., R. 3 E., containing 80 acres; NW ¼, Sec. 5, T. 4 N., R. 3 E., containing 135.74 acres; SW ¼, Sec. 5, T. 4 N., R. 3 E., containing 160 acres; SW ¼, Sec. 5, T. 4 N., R. 3 E., containing 160 acres; SE ¼, Sec. 5, T. 4 N., R. 3 E.,

taining 601.82 acres; SW ¼, Sec. 11, T. 4 N., R. 3 E., containing 160 acres; All of Sec. 15, T. 4 N., R. 3 E., containing 640 acres; E ½ NW ¼, Sec. 17, T. 4 N., R. 3 E., containing 80 acres; SE ¼, Sec. 17, T. 4 N., R. 3 E., containing 160 acres; All of Sec. 21, T. 4 N., R. 3 E., containing 640 acres; N ½ NW ¼, Sec. 23, T. 4 N., R. 3 E., containing 80 acres; All of Sec. 27, T. 4 N., R. 3 E., containing 640 acres; S. ½ SE¼, Sec. 29, T. 4 N., R. 3 E., containing 80 acres; E ½ NE ¼, Sec. 31, T. 4 N., R. 3 E., containing 80 acres; SW ¼ NE ¼, Sec. 31, T. 4 N., R. 3 E., containing 40 acres; W ½ NW ¼, Sec. 31, T. 4 N., R. 3 E., containing 59.01 acres; NW ¼ SW ¼, Sec. 31, T. 4 N., R. 3 E., containing 29.79 acres; SE ¼, Sec. 31, T. 4 N., R. 3 E., containing 160 acres; All of Sec 33, T. 4 N., R. 3 E., containing 640 acres; SW ¼, Sec. 7, T. 5 N., R. 3 E., containing 157.48 acres; SW ¼, Sec. 9, T. 5 N., R. 3 E., containing 160 acres; SE ¼, Sec. 9, T. 5 N., R. 3 E., containing 160 acres; E ½ SE ¼, Sec. 15, T. 5 N., R. 3 E., containing 80 acres; SW ¼ SE ¼, Sec. 15, T. 5 N., R. 3 E., containing 40 acres; All of Sec. 17, T. 5 N., R. 3 E., containing 640 acres; SW ¼, Sec. 19, T. 5 N., R. 3 E., containing 159.40 acres; NW ¼, Sec. 23, T. 5 N., R. 3 E., containing 160 acres; SW ¼, Sec. 23, T. 5 N., R. 3 E., containing 160 acres; All of Sec. 29, T. 5 N., R. 3 E., containing 640 acres; NW ¼, Sec. 31, T. 5 N., R. 3 E., containing 160.24 acres; SW ¼, Sec. 31, T. 5 N., R. 3 E., containing 160.08 acres; SE ¼, Sec. 31, T. 5 N., R. 3 E., containing 160 acres; All of Sec. 33, T. 5 N., R. 3 E., containing 640 acres; W ½ NE ¼, Sec. 35, T. 5 N., R. 3 E., containing 80 acres; NW ¼, Sec. 35, T. 5 N., R. 3 E., containing 160 acres;

SW ¼, Sec. 35, T. 5 N., R. 3 E., containing 160 acres; W ½ SE ¼, Sec. 35, T. 5 N., R. 3 E., containing 80 acres; W ½ NW ¼, Sec. 15, T. 2 N., R. 4 E., containing 80 acres; W ½ SW ¼, Sec. 15, T. 2 N., R. 4 E., containing 80 acres; All of Sec. 17, T. 2 N., R. 4 E., containing 640 acres; NE ¼, Sec. 19, T. 2 N., R. 4 E., containing 160 acres; Lot 3, Sec. 19, T. 2 N., R. 4 E., containing 34.57 acres; E ½ SW ¼, Sec 19, T. 2 N., R. 4 E., containing 80 acres; SE ¼, Sec. 19, T. 2 N., R. 4 E., containing 160 acres; All of Sec. 21, T. 2 N., R. 4 E., containing 640 acres; NE ¼, Sec. 29, T. 2 N., R. 4 E., containing 160 acres; NW ¼, Sec. 29, T. 2 N., R. 4 E., containing 160 acres; SW ¼, Sec. 29, T. 2 N., R. 4 E., containing 160 acres; Lot 1, Sec. 31, T. 2 N., R. 4 E., containing 31.98 acres; NE ¼ NE ¼, Sec. 1, T. 3 N., R. 1 E., containing 40.06 acres; SW ¼ NE ¼, Sec. 1, T. 3 N., R. 1 E., containing 40 acres; SW ¼ NW ¼,Sec. 1, T. 3 N., R. 1 E., containing 40 acres; SW ¼, Sec. 1, T. 3 N., R. 1 E., containing 160 acres; SE ¼ NE ¼, Sec. 3, T. 3 N., R. 1 E., containing 40 acres; SW ¼ NE ¼, Sec. 3, T. 3 N., R. 1 E., containing 40 acres; NE ¼ SW ¼, Sec. 3, T. 3 N., R. 1 E., containing 40 acres; SE ¼ SW ¼, Sec. 3, T. 3 N., R. 1 E., containing 40 acres; E ½ NW ¼, Sec. 11, T. 3 N., R. 1 E., containing 80 acres; SE ¼, Sec. 11, T. 3 N., R. 1 E., containing 160 acres; SE ¼ NW ¼, Sec. 13, T. 3 N., R. 1 E., containing 40 acres; NE ¼ SW ¼, Sec. 13, T. 3 N., R. 1 E., containing 40 acres; S ½ SW ¼, Sec. 13, T. 3 N., R. 1 E., containing 80 acres; NE ¼, Sec. 23, T. 3 N., R. 1 E., containing 160 acres; SE ¼ NW ¼, Sec. 23, T. 3 N., R. 1 E., containing 40 acres; NE ¼ NE¼, Sec. 1, T. 4 N., R. 1 E., containing 39.03 acres; SE ¼, NE ¼, Sec. 1, T. 4 N.,

R. 1 E., containing 40 acres; NE ¼ SW ¼, Sec. 1, T. 4 N., R. 1 E., containing 40 acres; N ½ SE ¼, Sec. 1, T. 4 N., R. 1 E., containing 80 acres; W ½ NE ¼, Sec. 9, T. 4 N., R. 1 E., containing 80 acres; W ½ SW ¼, Sec. 11, T. 4 N., R. 1 E., containing 80 acres; SE ¼, Sec. 35, T. 4 N., R. 1 E., containing 160 acres; SW ¼, Sec. 35, T 4 N., R. 1 E., containing 160 acres; N ½ NW ¼, Sec. 3, T. 5 N., R. 1 E., containing 77.33 acres; NE ¼, Sec. 3, T. 5 N., R. 1 E., containing 159.61 acres; Lot 5. Sec. 11, T. 5 N., R. 1 E., containing 9.95 acres; Lot 8, Sec. 11, T. 5 N., R. 1 E., containing 31.20 acres; E ½ NE ¼, Sec. 13, T. 5 N., R. 1 E., containing 80 acres; E ½ SW ¼, Sec. 13, T. 5 N., R. 1 E., containing 80 acres; SE ¼, Sec. 13, T. 5 N., R. 1 E., containing 160 acres; SW ¼ NE ¼, Sec. 15, T. 5 N., R. 1 E., containing 40 acres; SW ¼, Sec. 15, T. 5 N., R. 1 E., containing 160 acres; NW ¼ SE ¼, Sec. 15, T. 5 N., R. 1 E., containing 40 acres; S ½ SE ¼, Sec. 15, T. 5 N., R. 1 E., containing 80 acres; SE ¼, Sec. 21, T. 5 N., R. 1 E., containing 160 acres; NE ¼ NE ¼, Sec. 23, T. 5 N., R. 1 E., containing 40 acres;W ½ NE ¼, Sec. 23, T. 5 N., R. 1 E., containing 80 acres; E ½ NW ¼, Sec. 23, T. 5 N., R. 1 E., containing 80 acres; NW ¼ SE ¼, Sec. 23, T. 5 N., R. 1 E., containing 40 acres; SW ¼, Sec. 23, T. 5 N., R. 1 E., containing 160 acres; NW ¼, Sec. 25, T. 5 N., R. 1 E., containing 160 acres; E ½ SW ¼, Sec. 25, T. 5 N., R. 1 E., containing 80 acres; SE ¼, Sec. 25, T. 5 N., R. 1 E., containing 160 acres; W ½, NE ¼, Sec. 27, T. 5 N., R. 1 E., containing 80 acres; NW ¼, Sec. 27, T. 5 N., R. 1 E., containing 160 acres; SW ¼, Sec. 27, T. 5 N., R. 1 E., containing 160 acres; NE ¼ NE ¼, Sec. 33, T. 5 N., R. 1 E., containing 40 acres; Lot 4, Sec. 1, T. 6

N., R. 1 E., containing 39.07 acres; SW ¼ NW ¼, Sec. 1, T. 6 N., R. 1 E., containing 40 acres; Lot 1, Sec. 1, T. 6 N., R. 1 E., containing 39.94 acres; Lot 2, Sec. 1, T. 6 N., R. 1 E., containing 39.85 acres; *Lot* 3, Sec. 1, T. 6 N., R. 1 E., containing 39.76 acres; S ½ NE ¼ Sec. 1, T. 6 N., R. 1 E., containing 80 acres; SE ¼ NW ¼, Sec. 1, T. 6 N., R. 1 E., containing 40 acres; SW ¼, Sec. 1, T. 6 N., R. 1 E., containing 160 acres; SE ¼, Sec. 1, T. 6 N., R. 1 E., containing 160 acres; NE ¼, Sec. 3, T. 6 N., R. 1 E., containing 157.68 acres; NW ¼, Sec. 3, T. 6 N., R. 1 E., containing 158.48 acres; SE ¼, Sec. 3, T. 6 N., R. 1 E., containing 160 acres; SW ¼, Sec. 3, T. 6 N., R. 1 E., containing 160 acres; NE ¼, Sec. 9, T. 6 N., R. 1 E., containing 160 acres; SE ¼, Sec. 9, T. 6 N., R. 1 E., containing 160 acres; All of Sec. 11, T. 6 N., R. 1 E., containing 640 acres; All of Sec. 13, T. 6 N., R. 1 E., containing 640 acres; All of Sec. 15, T. 6 N., R. 1 E., containing 640 acres; NE ¼, Sec. 21, T. 6 N., R. 1 E., containing 160 acres; SE ¼, Sec. 21, T. 6 N., R. 1 E., containing 160 acres; All of Sec. 23, T. 6 N., R. 1 E., containing 640 acres; All of Sec. 25, T. 6 N., R. 1 E., containing 640 acres; All of Sec. 27, T. 6 N., R. 1 E., containing 640 acres; NE ¼, Sec. 33, T. 6 N., R. 1 E., containing 160 acres; SE ¼, Sec. 33, T. 6 N., R. 1 E., containing 160 acres; All of Sec. 35, T. 6 N., R. 1 E., containing 640 acres; All of Sec. 1, T. 7 N., R. 1 E., containing 642.36 acres; All of Sec. 3, T. 7 N., R. 1 E., containing 641 acres; NE ¼, Sec. 9, T. 7 N., R. 1 E., con g 160 acres; SE ¼, Sec. 9, T. 7 N., R. 1 E., containing 160 acres; All of Sec. 11, T. 7 N., R. 1 E., containing 640 acres; All of Sec. 13, T. 7 N., R. 1 E., containing 640 acres; All of Sec. 15, T. 7 N.,

R. 1 E., containing 640 acres; NE ¼, Sec. 21, T. 7 N., R. 1 E., containing 160 acres; SE ¼, Sec. 21, T. 7 N., R. 1 E., containing 160 acres; All of Sec. 23, T. 7 N., R. 1 E., containing 640 acres; All of Sec. 25, T. 7 N., R. 1 E., containing 640 acres; All of Sec. 27, T. 7 N., R. 1 E., containing 640 acres; NE ¼, Sec. 33, T. 7 N., R. 1 E., containing 160 acres; SE ¼, Sec. 33, T. 7 N., R. 1 E., containing 160 acres; All of Sec. 35, T. 7 N., R. 1 E., containing 640 acres; E. ½ NE ¼, Sec. 11, T. 8 N., R. 1 E., containing 80 acres; NE ¼ SE ¼, Sec. 11, T. 8 N., R. 1 E., containing 40 acres; S ½ SE ¼, Sec. 11, T. 8 N., R. 1 E., containing 80 acres; All of Sec. 13, T. 8 N., R. 1 E., containing 640 acres; All of Sec. 23, T. 8 N., R. 1 E., containing 640 acres; All of Sec. 25, T. 8 N., R. 1 E., containing 640 acres; E. ½ NE ¼, Sec. 27, T. 8 N., R. 1 E., containing 80 acres; SE ¼, Sec. 27, T. 8 N., R. 1 E., containing 160 acres; All of Sec. 35, T. 8 N., R. 1 E., containing 640 acres; NW ¼ NW ¼, Sec. 7, T. 4 N., R. 2 E., containing 40 acres; SW ¼ NW ¼, Sec. 7, T. 4 N., R. 2 E., containing 40 acres; NW ¼ SW ¼, Sec. 7, T. 4 N., R. 2 E., containing 40 acres; SW ¼ SW ¼, Sec. 7, T. 4 N., R. 2 E., containing 40 acres; Lot 4, Sec. 7, T. 5 N., R. 2 E., containing 40.30 acres; E ½ NW ¼, Sec. 19, T. 5 N., R. 2 E., containing 80 acres; W ½ NW ¼, Sec. 19, T. 5 N., R. 2 E., containing 80.99 acres; E. ½ SW ¼, Sec. 19, T. 5 N., R. 2 E., containing 80 acres; W. ½ SW ¼, Sec. 19, T. 5 N., R. 2 E., containing 81.37 acres; SE ¼, Sec. 19, T. 5 N., R. 2 E., containi[illegible]0 acres; Lots 1, 2, 3, 4, Sec. 31, T. 5 N., R. 2 E., conta[illegible]ng 162.40 acres; W ½ NW ¼, Sec. 5, T. 6 N., R. 2 E., containing 79.69 acres; W ½ SW ¼, Sec. 5, T. 6 N., R. 2 E., containing 80 acres; All of Sec.

7, T. 6 N., R. 2 E., containing 631.46 acres; NE ¼, NE ¼, Sec. 1, T. 2 N., R. 3 E., containing 39.82 acres; NW ¼ NE ¼, Sec. 1, T. 2 N., R. 3 E., containing 39.94 acres; S ½ NE ¼, Sec. 1, T. 2 N., R. 3 E., containing 80 acres; NE ¼ NW ¼, Sec. 1, T. 2 N., R. 3 E., containing 40.06 acres; NW ¼ NW ¼, Sec. 1, T. 2 N., R. 3 E., containing 40.18 acres; S ½ NW ¼, Sec. 1, T. 2 N., R. 3 E., containing 80 acres; SW ¼, Sec. 1, T. 2 N., R. 3 E., containing 160 acres; SE ¼, Sec. 1, T. 2 N., R. 3 E., containing 160 acres.

II.

Your orators further show unto your Honors that the defendant, the Northern Pacific Railroad Company, is a corporation organized and existing under and by virtue of an act of Congress, approved on the 2d day of July, 1864, entitled "An Act granting lands to aid in the construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound on the Pacific Coast, by the Northern Route."

III.

Your orators further show that in a certain suit and proceeding begun in the Circuit Court of the United States, for the Eastern District of Wisconsin, wherein the Farmers' Loan and Trust Company, of New York, a corporation organized pursuant to the laws of the state of New York, and then and now existing and doing business as such, was plaintiff, and the Northern Pacific Railroad Company, and others, were their defendants, in which said suit and proceeding the said Circuit Court, having then full and competent jurisdiction in the premises, proceeded to foreclose a certain mortgage against

the said Northern Pacific Railroad Company, and thereafter, and during the pendency of said action, an ancillary bill was filed and subsequent proceedings were had in the same case in the Circuit Court of the United States, for the District of Washington, and in the Northern Division thereof, in which said proceedings the said Circuit Court for the District of Washington, and the Northern Division thereof, having full power in the premises, did, on or about the 25th day of July, 1895, order, direct, and decree that all of the interest of the said Northern Pacific Railroad Company in the above described, and other lands, be sold to satisfy the said mortgage and other indebtedness of said company, and that the said lands were sold to the Northern Pacific Railway Company, which last-named company, your orators are informed and believe, is a corporation, duly organized and existing, but under what law or laws the said last-named railway company was organized your orators are not informed, and cannot state, but believe the said company was organized as a corporation under the laws of the State of Wisconsin.

IV.

And your orators further allege that the said Northern Pacific Railway Company have acquired the said lands as the successor in interest of the said Northern Pacific Railroad Company, if they have acquired the same, and hold the same by reason of purchase at a public sale held at the city of Seattle, in the State of Washington, under and by virtue of a decree of the said courts dated on the 3d day of August, 1895; and that

the said lands, so acquired, are held by the said railway company under the said decrees and by reason of the said sale, as successor of the said Northern Pacific Railroad Company, which said railway company now claims all of the right, title and interest which was formerly claimed or owned, in all of the lands or property of the said railroad company, and it is therefore made a defendant herein.

V.

Your orators further show that by the terms of the said act of July 2d, 1864, the Congress of the United States granted to the said Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and for other purposes, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty (20) alternate sections per mile, on each side of the said railroad line, as said company might adopt, through the territories of the United States whenever on the line thereof, the United States should have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights at the time the line of said railroad shall be definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office.

VI.

And your orators further show that by virtue of the said act of July 2d, 1864, a grant was made to the said Northern Pacific Railroad Company for a railroad via

the valley of the Columbia river to a point at or near Portland, Oregon, and that subsequent to the said grant, and on the 31st day of May, 1870, by a joint resolution of the Congress of the United States, lands were granted to aid the said company in constructing a road north of Portland to Puget Sound, which said grant conferred the land under the same terms and conditions as did the act of July 2d, 1864; that no map of definite location was filed in the office of the Commissioner of the General Land Office of the United States by the said Northern Pacific Railroad Company prior to the passage of the said joint resolution, and that the said Northern Pacific Railroad Company filed its map of general route in pursuance of the said joint resolution in the office of the Commissioner of the General Land Office of the United States on the 13th day of August, 1870, and said Northern Pacific Railroad thereupon showed a continuous line via the Valley of the Columbia River to Portland, Oregon, and from Portland, Oregon, extending northward from said city to Puget Sound, the location of the section of the said road between Portland, Oregon, and Wallula, Washington, coterminus with said lands, was definitely fixed by the filing of the map of definite location, which said map was filed by the said company in the office of the Commissioner of the General Land Office on the 14th day of May, 1874, locating said road from Portland eastward; and said land is otherwise unappropriated public lands of the United States.

VII.

Your orators further show unto your Honors that that

portion of said road, as shown on the map of definite location, being about 180 miles in extent, embracing all of said road between Wallula, Washington, and Portland, Oregon, was, and still is, wholly unconstructed.

VIII.

Your orators further show unto your Honors that the lands herein described lie east of a terminal line drawn at right angles to the last twenty-five miles of said road as shown upon the map of general route and of definite location east of Portland, and they also fall within the primary limits of the grant appertaining to the road as located and constructed north of Portland, or between Portland, Oregon, and the city of Tacoma, Washington.

IX.

Your orators further allege and show unto your Honors that that grant for the portion of the road between Portland and Puget Sound was made by the aforesaid joint resolution of May 31st, 1870 (16 Stat. at Large, 378); that under the act of July 2d, 1864, a grant was made to the Northern Pacific Railroad Company, as aforesaid, for a road via the valley of the Columbia river to a point at or near Portland; that when the said company filed its map of general route on the 13th day of August, 1870, said continuous line, as aforesaid, was shown on said map via the valley of the Columbia river; that the limits of the extent of the said grant to the said railroad company were adjusted as continuous limits, without regard to any conflict between said grants; that the said railroad was unconstructed, as aforesaid, on the 29th day of September, 1890, at which date an act of Congress was

passed (26 Stats. at Large, 466), which forfeited to the United States all lands theretofore granted to any State or to any corporation to aid in the construction of a railroad, opposite to and coterminous with the portion of any such road not then completed.

X.

Your orators further show unto your Honors that the grant to that portion of the road east of Portland, was forfeited by the act of forfeiture of September 29th, 1890, for the reason that said lands were opposite to and coterminous with said portion of the said road as located upon its map of general route east of Portland, and because such lands were coterminous with an uncompleted section of said road of more than twenty-five miles in extent, more than the said last twenty-five miles of said road having never been completed, all the said lands were forfeited, as aforesaid, by the said act of September 29th, 1890, and by the terms and provisions of the said act of forfeiture none of the lands so forfeited inure by reason of such forfeiture to any other grant to the said road, and none of the said mentioned lands inure to the Northern Pacific Railroad Company by virtue of its grant of May 31st, 1870, but all of said lands reverted to, became, and now are the public lands of the United States; that the limits of said grant to the said Northern Pacific Railroad Company for the portion of its road via the valley of the Columbia River and east of Portland overlaps the subsequent grant for that portion of the said road north of Portland, and that the said latter grant, to the extent that the same conflicts with the prior

grant of the said Northern Pacific Railroad Company, fails, and the said lands, as aforesaid, are restored to the public domain, and that all of the lands described in this complaint fall within that portion of the grant forfeited by reason of the said Northern Pacific Railroad Company failing to construct its road from Wallula, Washington, to Portland, Oregon, because said lands were appropriated and reserved from the said grant of land of May 31st, 1870, because said lands were at that time subject to the prior grant of the said Northern Pacific Railroad Company.

XI.

Your orators further show unto your Honors that notwithstanding that on the 13th and 23d days of May, 1895, and at all times subsequent to the 29th day of September, 1890, the said lands were forfeited to the United States, and that the United States were the sole and exclusive owners thereof, in fee, and that the said lands were held by the United States; and notwithstanding the fact that the officers of the Interior Department of the United States, and the President thereof, were deprived of and possessed no legal right, power, or authority, or jurisdiction to convey said lands, or any part thereof, to the said company, yet, so it is, that the said officers of the said Interior Department and the President of the United States, being ignorant of the fact that said lands had been forfeited to the United States by the said act of September 29th, 1890, and being uninformed that the said lands had been appropriated prior to the joint resolution of May 31st, 1870, and that the same were exempted from the operation of the said grant to the said railroad, yet

their said officers, believing that the said lands were properly patentable to the Northern Pacific Railroad Company by virtue of the aforesaid acts and joint resolution of Congress, and that the same were unappropriated at the time of the construction of the said line of road between Tacoma and Portland, which said road, as aforesaid, was constructed subsequent to the filing of said map of definite location and prior to the patenting of the lands herein set forth, and believing that said lands were subject to the said grant and passed to the said company by virtue of the said last-mentioned grant, and being mistaken and misinformed of the truth and facts concerning the condition of the said lands and the construction of the said road, and being requested and importuned by the said Northern Pacific Railroad Company thereto, did, by mistake and inadvertence, erroneously issue and deliver to the said Northern Pacific Railroad Company, on the 23d day of May, 1895, and on the 27th day of May, 1895, patents, in due form of law, conveying to the said Northern Pacific Railroad Company the legal title to the said hereinbefore described mentioned tracts of land; but that the said patents were issued to the said company without any consideration whatever other than the pretended claim of the said railroad to the said lands by virtue of the said grants.

XII.

Your orators further show that on the 27th day of April, 1896, and on the 13th day of August, 1896, the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, made due demand, in writing, upon the Northern Pacific Railroad

Company for the reconveyance of the hereinbefore described tracts of land, and that in response to the said demands, so made in pursuance of law, which demand directed the said Northern Pacific Railroad Company, within ninety (90) days from the date of the receipt of said notice and request, to reconvey said lands in question to the United States of America, and further notified the said company that in case the said demand was not complied with that the matter would be submitted to the Department with the recommendation that suit be instituted with view to the recovery of said lands, said notice being in accordance with the provisions of a statute approved March 3d, 1887 (24th Stat. at Large, page 555), and was in all respects in proper legal form; that thereafter the said company, through its resident and duly authorized attorneys Messrs. Britton and Gray, of the city of Washington, District of Columbia, notified the Department that the said Northern Pacific Railroad Company declined to make such reconveyance for the reason, as above stated, and as was then stated in said refusal, in writing, that the said Northern Pacific Railroad Company claimed that it had earned the said described lands by virtue of the construction of its road, and was therefore justly entitled to the issuance of patents for the same; and the said company, on said ground, refused to reconvey the said lands; and that the said Northern Pacific Railroad Company does still refuse to comply with the said demand so made by the Secretary of the Interior, through the Commissioner of the General Land Office; and that the said company has refused and still refuses

to relinquish or reconvey said lands, or to surrender the patents theretofore wrongfully and erroneously issued by the said Department and by the said company obtained, as the said company was in duty bound to do.

XIII.

Your orators further show that the said patents to the said Northern Pacific Railroad Company were erroneously issued, as aforesaid; and the said deed of sale, made in pursuance of the decrees, to the Northern Pacific Railway Company, cloud the title to the said mentioned tracts of land, and that there now exists by reason there of a cloud upon the title of your orators to the said lands, and every part thereof, which has interfered with, and still does interfere with the free use and disposition of the said lands, and every part thereof, under the laws of Congress; that the said cloud so caused, as aforesaid, has greatly injured and depreciated, and still does greatly injure and depreciate, the value of the said lands, and every part thereof, forasmuch, therefore, as your orators are without adequate remedy in said premises, except in a court of equity, where such matters are properly cognizable, and to the end that the Northern Pacific Railroad Company and the Northern Pacific Railway Company may be required, according to the best and utmost of their knowledge, remembrance, information, and belief, respectively, to make such full, true, direct, and perfect answers (but not under oath, the answer under oath being hereby waived), to all and singular the matters and things herein set forth and alleged as fully and particularly as if the same were repeated and said defendants,

and each of them, distinctly interrrogated thereto and thereupon.

Your orators pray that the said patents so erroneously issued from the United States to the said Northern Pacific Railroad Company for the above-described lands, and the sale of the said lands to the Northern Pacific Railway Company, and each of them, be surrendered up, canceled, annuled, set aside and held for naught; that your orators have such other and further relief in the premises as equity and good conscience may require and to your Honors shall seem meet.

May it please your Honors to grant the writ of subpoena in chancery, directed to the said defendants, and each of them, commanding them, and each of them, under a certain penalty to be therein limited, that they be and appear before your Honors on a day certain, therein named, then and there full, true, direct and perfect answers make to all and singular the terms, and stand to perform and abide by such further order, direction, and decree as to your Honors shall seem meet; and that your orators may have and recover from the said defendants all reasonable costs and disbursements herein expended and incurred.

JOSEPH McKENNA,
Attorney General of the United States.

WM. H. BRINKER,
United States Attorney for the District of Washington.

F. C. ROBERTSON,
Assistant United States Attorney.

And afterwards, to wit, on the 27th day of July, 1897, there was duly issued out of said court in said cause a subpoena, in words and figures as follows, to wit:

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

IN EQUITY.

Summons.

The President of the United States of America, Greeting, to the Northern Pacific Railway Company and the Northern Pacific Railroad Company:

You are hereby commanded that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Tacoma, on the sixth day of September, A. D. 1897, to answer a bill of complaint exhibited against you in said court by the United States of America, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty of five thousand dollars.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, this 27th day of July, in the year of our Lord one thousand eight hundred and ninety-seven, and of our Independence the 122d.

[Seal of the Court] A. REEVES AYRES,
Clerk.

By _____,
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12, SUPREME COURT, U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of September next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

[Seal of the Court]

A. REEVES AYRES,
Clerk.

By _____,
Deputy Clerk.

United States Marshal's Office,
District of Washington. } ss.

I hereby certify that I received the within writ on the 27th day of July, 1897, and personally served the same on the 2d day of August, 1897, by delivering to and leaving with Thomas Cooper, agent of the Northern Pacific Railway Company for service of process within District of Washington, said defendants named therein personally, at the city of Tacoma, county of Pierce, in said District, an attached copy thereof. After diligent search I have been unable to find any official of the Northern Pacific Railroad Company within this District.

Tacoma, August 2, 1897.

JAMES C. DRAKE,
United States Marshal.
By F. L. Crosby,
Deputy.

[Endorsed]: Filed in the United States Circuit Court, August 2, 1897. A. Reeves Ayres, Clerk. By Sam'l D. Bridges, Deputy.

And afterwards, to wit, on the 4th day of October, 1897, there was duly filed in said court in said cause a joint and several answer of the Northern Pacific Railroad Company and the Northern Pacific Railway Company, in the words and figures following, to wit:

In the United States Circuit Court, for the District of Washington, Western Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY and NORTHERN PACIFIC RAILWAY COMPANY,
Defendants.

Joint and Several Answer of the Northern Pacific Railroad Company and the Northern Pacific Railway Company.

These defendants now, and at all the times hereafter, saving to themselves all and all manner of benefit or advantage of exceptions or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill of complaint contained, for answer thereto, or to so much thereof as these defendants are advised is material or necessary for them to make answer to, answering say:

I.

Defendants deny that the complainant is now, or at any time since July 2, 1864, has been, the owner of the lands described in the bill of complaint, or any thereof; and defendants aver that the said lands passed to the Northern Pacific Railroad Company under and by virtue of the act of Congress approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, by the Northern Route," and the joint Resolution of Congress approved May 31, 1870, entitled "A Resolution authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road, and to secure the same by mortgage, and for other purposes," as herein more particularly set forth; and that said railroad company has, except as hereinafter set forth, since remained the owner thereof.

II.

These defendants admit that the Northern Pacific Railroad Company is a corporation as alleged in said bill of complaint.

III.

These defendants admit that in a certain suit and proceeding begun in the United States Circuit Court for the Eastern District of Wisconsin, wherein the Farmers' Loan and Trust Company of New York, a corporation organized pursuant to the laws of the State of New York, and then and now existing and doing business as such, was complainant and the Northern Pacific Railroad Com-

pany and others were defendants, in which said suit and proceedings the said Court then had full and competent jurisdiction in the premises, the said Court proceeded to foreclose a certain mortgage against said Northern Pacific Railroad Company; and admit that thereafter and during the pendency of said action an ancillary bill was filed and subsequent proceedings were had in the same case in the United States Circuit Court for the District of Washington, Northern Division, and that in said proceedings, the said United States Circuit Court for the District of Washington, Northern Division, having full power in the premises, did on or about the 25th day of July, 1896, order, direct, and decree that all of the interest of the said Northern Pacific Railroad Company in the lands described in the bill of complaint and any other lands, be sold to satisfy the said mortgage and other indebtedness of said railroad company; and admit and aver that the lands so sold were sold to the Northern Pacific Railway Company, and that the said last-named Company is a corporation duly organized and existing under the laws of the State of Wisconsin.

But these defendants further aver that prior to the date of said sale to the said Northern Pacific Railway Company many of the said lands described in said bill of complaint had been contracted by instruments in writing to be sold by the said Northern Pacific Railroad Company, or for and on its account by certain receivers thereof; that many of said contracts had been fulfilled by the parties therein contracting with said railroad company and the receivers thereof, and that said railroad company and the receivers thereof had made, executed and deliv-

ered to such contracting parties instruments in writing which were in form sufficient to convey and which did convey to said parties all of the right, title, interest, claim and demand of the said Northern Pacific Railroad Company in and to the said lands so sold and conveyed. That the terms and provisions of others of said contracts had not been fulfilled by the parties therein named as contracting with said Northern Pacific Railroad Company and the receivers thereof, and the full payment of the purchase price of the lands so contracted to be sold had not been made by the said parties to the said railroad company or to the receivers thereof; that since the sale and conveyance under said decree to the said Northern Pacific Railway Company as aforesaid some of said parties who had theretofore contracted with the said Northern Pacific Railroad Company and with the receivers thereof, for the conveyance of certain of said lands, have fulfilled the terms and provisions of their said contracts, and this defendant the said Northern Pacific Railway Company, has, pursuant to the terms and provisions of said contracts, made, executed and delivered to said parties instruments in writing sufficient to convey and which did convey to said parties the said lands so contracted to be sold and conveyed to said parties. That exhibit "A" hereunto annexed correctly sets forth the various parcels of land contracted to be sold by the said Northern Pacific Railroad Company or by the receivers thereof, as aforesaid, which were so sold and conveyed by said railroad company or by the receivers thereof, and correctly sets forth the date of said contracts, the amount of the purchase price of said lands, the amount thereof paid to

the railroad company and the amount paid to said receivers, the date of the deeds of conveyance, and the names of the grantees. That exhibit "B" hereunto annexed correctly sets forth the various parcels of land which were so contracted to be sold by the said Northern Pacific Railroad Company or the receivers thereof, and which have heretofore been conveyed by the defendant the Northern Pacific Railway Company pursuant to the terms and provisions of said contracts; that said exhibit further correctly sets forth the date of said contracts, the amount of the purchase price of said lands, the date of the deeds of conveyance and the names of the grantees, and the amount of the consideration paid to the said Northern Pacific Railroad Company, the amount thereof paid to the receivers of said Northern Pacific Railroad Company, and the amount of such consideration paid to the said Northern Pacific Railway Company. That exhibit "C" hereunto annexed correctly sets forth the various parcels of land contracted to be sold by the said Northern Pacific Railroad Company or the receivers thereof which have not heretofore been conveyed pursuant to the terms and provisions of said contracts; that said exhibit also correctly sets forth the date of said contracts, the consideration for which said lands were so agreed to be sold and conveyed as aforesaid, the portion of that consideration paid to the Northern Pacific Railroad Company, the portion thereof paid to the receivers of said Northern Pacific Railroad Company, and the portion thereof paid to this defendant, the Northern Pacific Railway Company, and also correctly sets forth the names of the parties so con-

tracting with the said Northern Pacific Railroad Company.

That the several parcels of land so described in said schedules marked exhibits "A," "B," and "C," and all thereof, were purchased by the respective persons named as purchasers in said exhibits for a valuable consideration and in good faith, as part of the grant to said Northern Pacific Railroad Company.

IV.

These defendants deny that the said Northern Pacific Railway Company have acquired all of the lands described in said bill of complaint as the successor in interest of the said Northern Pacific Railroad Company, and deny that they have acquired and hold the same by reason of the purchase thereof under and by virtue of the decree of said Court; but they admit that the Northern Pacific Railway Company acquired the interest of the said Northern Pacific Railroad Company in and to said lands which had not theretofore been sold and conveyed by the said Northern Pacific Railroad Company or the receivers thereof as the successor in interest of the said Northern Pacific Railroad Company, and that they acquired the same and hold the same by reason of the purchase at public sale held at the city of Seattle, in the State of Washington, under and by virtue of the decree of said Courts, dated August 3, 1896, and admit that the lands and the interest therein so acquired are held by the said railway company under the said decrees and by reason of the said sale, as the successor of the said Northern Pacific Railroad Company; but they deny

that the said Northern Pacific Railway Company now claims all the right, title and interest which was formerly claimed or owned in all of the lands or property of the said Northern Pacific Railroad Company, but they admit that the said railway company now claims all of the right, title, and interest in and to said lands which was claimed or owned by the said Northern Pacific Railroad Company at the date of the conveyance to the said Northern Pacific Railway Company as aforesaid, and which has not been since sold or conveyed by the said Northern Pacific Railway Company.

V.

And for further answer to the matters and things set forth and charged in said bill, and particularly to the matters and things set forth and charged in the 5th and 6th paragraphs thereof, these defendants say they admit that by the terms of the act of Congress approved July 2, 1864, the Congress of the United States granted to said Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and for other purposes, certain lands, substantially as in the 5th paragraph of said bill of complaint set forth. They deny that by virtue of the act of July 2, 1864, a grant was made to the said Northern Pacific Railroad Company for a railroad via the valley of the Columbia River to a point at or near Portland, Oregon, but they admit that provision was made in said act of July 2, 1864, for the location and construction of a branch railroad and telegraph line of said Northern Pacific Railroad Company

via the valley of the Columbia River to a point at or near Portland, Oregon, and that a grant to aid in the construction of said branch line was provided for in said act. They admit that on the 31st day of May, 1875, by a joint resolution of the Congress of the United States, certain lands were granted to aid the company in constructing the road north of Portland to Puget Sound, but beg leave to refer to said joint resolution for the true contents and interpretation thereof. They admit that no map of definite location was filed in the office of the Commissioner of the General Land Office of the United States by the said Northern Pacific Railroad Company prior to the passage of the said joint resolution of May 31, 1870. They deny that the said Northern Pacific Railroad Company filed its map of general route in pursuance of said joint resolution, in the office of the Commissioner of the General Land Office of the United States on the 13th day of August, 1870, but they admit that said company caused a map of its general route to be filed in the office of the Commissioner of the General Land Office on the 13th day of August as hereinafter more particularly set forth. They deny that the said Northern Pacific Railroad Company showed upon said map a general route and continuous line via the valley of the Columbia river to Portland, Oregon, and from Portland, Oregon, extending northward to Puget Sound, but they admit that the said Northern Pacific Railroad Company showed upon said map a continuous line via the valley of the Columbia River to a point at or near Vancouver, in the Territory (now State) of Washington, and from thence extending northwardly to Puget Sound. They deny that the location

of the section of said road between Portland, Oregon, and Wallula, Washington, was definitely fixed by the filing of a map of definite location in the office of the Commissioner of the General Land Office on the 14th day of May, 1874, or at any other time, and deny that the section of the said road between Portland, Oregon, and Wallula, Washington, or any thereof, was ever definitely located or definitely fixed by the filing of a map of definite location in the office of the Commissioner of the General Land Office, or elsewhere, and they deny that the land described in the bill of complaint is otherwise unappropriated public lands of the United States.

And for further answer these defendants say that by the terms and provisions of the said act of Congress approved July 2, 1864, the said Northern Pacific Railroad Company was authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as should be determined by said company, within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget Sound; with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon.

By the third section of said act provision was made as follows: "That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast,

* * * * every alternate section of public land, not mineral designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of the said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. . . . . Provided, further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, may be selected as above provided; and provided further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal.'"

By section 4 of said act it was further provided that whenever said company should have twenty-five consecutive miles of any portion of said railroad and telegraph

line ready for the service contemplated, the President of the United States should appoint three commissioners to examine the same; and if it should appear that such twenty-five consecutive miles of said road and telegraph line had been completed in a good, substantial and workmanlike manner, as in all other respects required by said act, the commissioner should so report to the President of the United States and patents of lands, as aforesaid, should be issued to said company, confirming to said company the right and title to said lands situated opposite to, and coterminus with, said completed section of said road; and that whenever, from time to time, twenty-five additional consecutive miles should have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then the patents should be issued to the said company, conveying the additional sections of land as aforesaid; and so on as fast as every twenty-five miles of said road should be so completed. That by said section 6 of the said act it was further enacted and provided as follows, to wit:

"And be it further enacted, that the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption

rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting these hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre when offered for sale."

That the said railroad company duly accepted the terms, conditions and impositions of said act, and signified such acceptance in writing under the corporate seal of the said company, duly executed pursuant to the direction of its board of directors, first had and obtained, and within two years after the passage of said act, to-wit: December 29, 1864, served such acceptance on the President of the United States.

That by the joint resolution approved May 31, 1870, entitled "A resolution authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road, and to secure the same by mortgage, and for other purposes," the Congress of the United States, among other things, provided as follows, to wit:

"That the Northern Pacific Railroad Company be and hereby is authorized . . . . to locate and construct under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget's Sound via the valley of the Columbia River with the right to locate and construct its branch from some convenient point on its main

trunk line across the Cascade mountains to Puget Sound."

And for a more complete statement of the provisions of said acts and joint resolutions of Congress, these defendants beg leave to refer thereto.

That the said Northern Pacific Railroad Company having surveyed the general route of said railroad line extending from a point on Lake Superior in the State of Wisconsin, to a point on Puget Sound, on the 26th day of July, 1870, transmitted to the Secretary of the Interior maps showing the line of said general route. That the said maps, so transmitted, were received by the said secretary July 30, 1870, and thereafter, to wit, August 13, 1870, the said Secretary of the Interior transmitted the said maps to the commissioner of the general land office with the following instructions:

"Department of the Interior,

Washington, D. C., August 13, 1870.

Sir: I transmit herewith two maps showing the designated route of the Northern Pacific Railroad.

You will immediately direct the proper local land officers in the States of Wisconsin and Minnesota to withhold from sale, pre-emption, homestead and other disposal the odd numbered sections not sold, reserved, and to which prior rights have not attached, within 20 miles on each side of the route, and in like manner direct those officers in Washington Territory to withhold such odd numbered sections as lie south of the town of Steilacoom. The unsurveyed as well as surveyed lands will be included in the reservation, and you will direct the local

officers to give notice accordingly; and as the township plats are received by them, they will make the proper notes of reservation thereon.

The withdrawal will take effect from the receipt of the order at the local office.

Very respectfully, your obedient servant,

J. D. COX,
Secretary.

Hon. JOS. S. WILSON,
Commissioner of the General Land Office."

That on said August 13, 1870, said maps, so approved by the Secretary or the Interior, were duly filed in the office of the Commissioner of the General Land Office. That after the filing of the said maps in the office of the Commissioner of the General Land Office, as aforesaid, the said commissioner caused to be prepared and made maps and records of the general land office designating the limits of the lands in the said territory of Washington reserved for the said railroad company on and within twenty miles of said line of general route so fixed as aforesaid; and thereafter, to wit, September 20, 1870, the said commissioner transmitted to the register and receiver of the United States district land office at Vancouver, Washington, a diagram showing that portion of the said general route of the Northern Pacific Railroad so fixed as aforesaid extending through said land district with limits designated thereon including all land coterminus with said line and within twenty miles thereof in said land district; and transmitted with said diagram the following letter of instructions, to wit:

"Department of the Interior,
General Land Office,
September 20, 1870.

Gentlemen: I transmit herewith a diagram showing the designated route of the Northern Pacific Railroad act of July 2, 1864, and by direction of the Secretary of the Interior you are requested to withhold from sale or location, pre-emption or homestead entry, all odd numbered sections of public lands falling within the limits of 20 miles as designated on this map.

You will also increase the price to $2.50 per acre the even-numbered sections within these limits, and dispose of them at that ratability under the pre-emption and homestead laws only, no private entry of the same being admissible until these lands have been offered at the increased price.

This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt.

Very respectfully,
JOS. S. WILSON,
Commissioner.

Register and Receiver, Vancouver, Wash."

That the said diagram and letter of instructions were received and filed in said United States District land office at Vancouver, Washington, the 17th day of October, 1870.

That thereafter, to wit, October 27th, 1870, the Secretary of the Interior instructed the Commissioner of the General Land Office as follows, to wit:

"Department of the Interior,
Washington, D. C., October 27, 1870.

Sir: In my letters of the 13th and 16th August last a withdrawal of lands for 20 miles on each side of the route of the Northern Pacific Railroad in Washington Territory was ordered to be made. That withdrawal will be increased to 40 miles on each side of the route, and you will issue instructions accordingly.

Very respectfully, your obedient servant,

J. D. COX,
Secretary.

Hon. JOS. S. WILSON,
Commissioner of the General Land Office."

And that November 21, 1870, the said Commissioner of the General Land Office, pursuant to said instructions, transmitted to said register and receiver the following order, to wit:

"Department of the Interior,
General Land Office,
November 21, 1870.

Gentleman: The Secretary of the Interior having ordered the withdrawal of 20 additional miles on each side of the Northern Pacific Railroad in your district, I herewith inclose a map showing the extent of such additional withdrawal, and you are directed to withhold from sale or location pre-emption, or homestead entry, all odd-numbered sections of land in the additional limits of 20 miles as indicated on the map.

The even-numbered sections you will increase in price to $2.50 per acre and dispose of at that ratability, but only under pre-emption and homestead laws.

This order will take effect from the date of the receipt of this letter by you and you are requested to notify us of the day it may be so received.

Very respectfully,

JOS. S. WILSON,

Commissioner.

Register and Receiver, Vancouver, Wash."

That the said order and map were received and filed in the said United States district land office at Vancover, Washington, December 8, 1870.

That the general route of said road so fixed ran near where the town of Wallula now stands, thence via the valley of the Columbia River to a point near Vancouver, thence northerly to Puget Sound.

That all of the lands described in the bill of complaint herein then were, and at all times since have been, in the district of lands for sale at the said district land office at Vancouver, Washington, and were coterminus with and within 40 miles of said line of general route so fixed as aforesaid, and were within the limits of said orders of withdrawal. That the said lands were, at the time of fixing the said line of general route, and at the dates when the said orders of withdrawal were received at said United States district land office at Vancouver, Washington, public lands to which the United States had full title, not reserved, sold, granted or otherwise appropriated and were free from pre-emption or other claims or rights. That said lands were and are non-mineral in character.

That the said Northern Pacific Railroad Company hav-

ing surveyed and definitely located that portion of its said railroad and telegraph line extending from Kalama to Tenino, in the Territory (now State) of Washington, definitely fixed the same by filing a plat thereof, duly approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office, on the 13th day of September, 1873; that upon the filing of said map the said commissioner caused to be made and designated upon the maps and records of his said office the limits of the lands granted to said railroad company by the said act of Congress approved July 2, 1864, and the joint resolution approved May 31, 1870, to wit, the 40 and 50 mile limits on each side of and coterminus with said line of definite location, the first named being the lands in place, the second being the limits of idemnity provided for in act of Congress of July 2, 1864; and at the same time the said commissioner caused to be made and designated upon said maps and records the terminal limits of the lands coterminus with said line of definite location, which said terminal limits were perpendicular to the general course of said line of definite location extending from Kalama to Tenino as aforesaid. That thereafter the said commissioner, under the direction of the Secretary of the Interior, transmitted to the United States district land office at Vancouver, Washington, that being the land office for the district in which the said lands were situate, a copy of said map showing that portion of the definite location of said railroad and telegraph line extending from Kalama to Tenino as aforesaid, with the 40 mile, or place limits, and the 50 mile or indemnity limits indicated thereon, and transmitted

with said diagram the following letter of instructions, to wit:

"Department of the Interior,
General Land Office,
Washington, D. C., Jany. 21st, 1874.

Register and Receiver, Vancouver, W. T.

Gentlemen: I transmit herewith a diagram showing the forty and fifty mile limits of the land grant to the Northern Pacific Railroad Company in your district, as now definitely fixed, and you are hereby directed to withhold from sale or entry all the odd-numbered sections falling within those limits, not heretofore withdrawn upon the general route of the road, the limits of which are shown on the diagram in green.

The even sections within the forty mile limits are to be held at the double minimum price of $2.50 per acre, but the even sections between the forty and fifty mile limits at $1.25 per acre only.

This additional withdrawal of odd sections, and increase in price of the even sections, takes effect from September 13th, 1873, the date of the filing of the map of definite location in this office by the Company.

Be pleased to acknowledge the date of the receipt of this letter.

Very respectfully,
WILLIS DRUMMOND,
Commissioner."

The said letter of instructions and the diagram were received and filed in the said district land office February 10, 1874.

A portion of the lands described in the bill of complaint herein were coterminus with and within forty miles of the said line of definite location and within the place limits of said grant as shown upon the said diagram; that said lands were, at the date of filing said map of definite location in the office of the Commissioner of General Land Office, and at the time said diagram and order of withdrawal were received and filed in the said district land office at Vancouver, as aforesaid, public lands, not reserved, sold, granted or otherwise appropriated and were free from pre-emption or other claims or rights except such claims and rights as had theretofore attached in favor of the Northern Pacific Railroad Company upon the fixing of the general route of its said railroad coterminus with said lands as hereinbefore set forth.

That the said Northern Pacific Railroad Company having surveyed and definitely located that portion of its said railroad and telegraph line extending from said Kalama in Washington, to Portland, in the State of Oregon, fixed such line of definite location by causing a plat thereof, duly approved by the Secretary of the Interior, to be filed in the office of the Commissioner of the General Land Office; that said plat was so filed September 22, 1882. That upon the filing of said plat the said commissioner caused to be made and designated upon the maps and records of his said office, the limits of the lands granted to said company by the said act of Congress approved July 2, 1864, and the joint resolution approved May 31, 1870, to wit, the 20 and 30 mile limits on each side of said line of definite location; the first

named being the lands in place, the second being the limits of indemnity provided for in the act of Congress approved July 2, 1864. That at the same time the said commissioner caused to be made and designated upon said records the terminal limits of the lands coterminus with the said line of definite location from Kalama to Portland as aforesaid; the said northern terminal limit coinciding with the southern terminal limit of the grant coterminus with the line from Tenino to Kalama fixed as hereinbefore set forth, and the said southern terminal limit being perpendicular to the general course of the said line of definite location.

That portion of the said lands described in the bill of complaint herein not coterminus with, and within 40 miles of, said line of definite location extending from Tenino to Kalama as aforesaid, were coterminus with and within 20 miles of said line of definite location extending from Kalama to Portland as aforesaid; and said lands were, at the date of filing said map of definite location in the office of the Commissioner of the General Land Office as aforesaid, public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and were free from pre-emption or other claims or rights except such claims or rights as may have attached thereto in favor of said Northern Pacific Railroad Company upon the fixing of the general route of its said railroad coterminus with the said lands as hereinbefore set forth.

That the said Northern Pacific Railroad Company proceeded with the construction of its railroad and telegraph line extending from Kalama to a point near

Tenino, 65 miles distant from Kalama, and having completed said railroad and telegraph line in a good substantial and workmanlike manner, the same was examined by commissioners appointed by the President of the United States for that purpose and was, in 1873, reported by said commissioners to have been so constructed in all respects as required by the acts of Congress; and thereupon, to wit, September 10, 1873, that portion of said railroad and telegraph line was accepted by the President of the United States, who directed that patents for the lands due on account of the construction thereof should be issued to said company.

That thereafter, to wit, in 1882 and 1883, the said railroad company proceeded with and completed the construction of its said railroad and telegraph line extending from a point on the left bank of the Columbia river opposite Kalama to the city of Portland in the State of Oregon; that the President of the United States having appointed commissioners to examine the said portion of said railroad and telegraph line, the said commissioners examined the same and reported that it had been constructed in a good, substantial and workmanlike manner in all respects as required by the act of Congress; that thereupon, to wit, October 4th, 1883, the President of the United States accepted said railroad and telegraph line and directed that patents for the lands earned by the construction thereof should be issued to the said Northern Pacific Railroad Company.

VI.

And these defendants further say, that the portion of

the said Northern Pacific railroad and telegraph line extending from the town of Wallula, in the Territory (now State) of Washington, via the valley of the Columbia River, to a point at or near Portland, Oregon, has never been definitely located, and that no plat thereof has been filed with the Secretary of the Interior, or in the office of the Commissioner of the General Land Office, except the said map of the line of general route as hereinbefore set forth; but they admit and aver that said portion of said railroad and telegraph line extending between Wallula, Washington, and Portland, Oregon, still is wholly unconstructed.

VII.

These defendants admit that the lands described in the bill of complaint herein lie east of a terminal line drawn at right angles to the last 25 miles as shown upon the map of general route, east of Portland, and that they also fall within the place or primary limits of the grant pertaining to the road as located and constructed north of Portland and between Portland, Oregon, and the city of Tacoma, Washington; but they deny that said lands lie east of the terminal line drawn at right angles to the last 25 miles of road as shown upon any map of definite location east of Portland, and aver that there is no map of definite location on the Northern Pacific railroad east of Portland, or between Portland, Oregon, and Wallula, Washington, or of any portion of said road between said points.

VIII.

These defendants deny that the grant for the portion

of the said Northern Pacific Railroad between Portland, Oregon, and Puget Sound, was made by the joint resolution of Congress approved May 31, 1870, but submit that said grant was made by the act of Congress approved July 2, 1864, as amended by the said joint resolution of Congress approved May 31, 1870; they deny that under the act of Congress approved July 2, 1864, a grant was made to the Northern Pacific Railroad Company for a road via the valley of the Columbia River, to a point at or near Portland, Oregon, and beg leave to refer to said act for the true contents and interpretation thereof. They admit that when the said Northern Pacific Railroad Company filed its map of general route on the 13th day of August, 1870, a continuous line was shown on said map via the valley of the Columbia River, but they deny that the limits and extent of the grant to said Northern Pacific Railroad Company were adjusted as continuous limits without regard to any conflict between the said grants, or were adjusted otherwise than as hereinbefore set forth; and they deny that there was any conflict between the said grants, or that there was more than one grant provided for in the act of Congress approved July 2, 1864, as modified by the joint resolution of May 31, 1870. Defendants admit that by an act of Congress approved September 29, 1890, entitled "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and for other purposes," the Congress of the United States resumed the title to all lands theretefore granted to any State or to any corporation, to aid in the construction of

a railroad opposite to and coterminous with the portion of any such railroad not completed and in operation for the consideration or benefit for which said lands were granted, but defendants beg leave to refer to said act for the true contents and interpretation thereof. And these defendants admit that no portion of the Northern Pacific railroad or telegraph line extending between Portland, Oregon, and Wallula, Washington, was constructed or completed at the date of the passage of said act, or has since been constructed or completed.

IX.

These defendants deny that the grant to that portion of the road east of Portland, Oregon, was forfeited by the said act of Congress approved September 29, 1890, and aver that the said acts of July 2, 1864, and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof, had never attached to any lands opposite to or coterminous with the portion of the said road between Portland, Oregon, and Wallula, Washington, for the reason that the line of that portion of said road had never been definitely located or fixed; and they deny that none of the lands described in said bill inured to the Northern Pacific Railroad Company by virtue of its grant of May 31, 1870; and deny that all or any of said lands reverted to, became or now are public lands of the United States; and they submit that the title to the said lands described in the said bill of complaint having vested in the said Northern Pacific Railroad Company under and by virtue of the proceedings hereinbefore set forth, remained unaffected by the provisions

of the said act of Congress approved September 29, 1890. Defendants deny that the limits of the grant to the said Northern Pacific Railroad Company for the portion of its road via the valley of the Columbia River, and east of Portland, Oregon, overlaps the subsequent grant for that portion of said road north of Portland; and deny that the said latter grant to the extent that it conflicts with the prior grant to the said Northern Pacific Railroad Company, fails; and deny that the said lands, or any thereof, are restored to the public domains; and deny that all or any of the lands described in the bill of complaint herein fall within that portion of the grant forfeited by reason of the said Northern Pacific Railroad Company failing to construct its road from Wallula, Washington, to Portland, Oregon; and deny that said lands were appropriated and reserved from the said grant of land of May 31, 1870; and deny that there is any overlap or conflict between a subsequent and prior grant; and deny that the said joint resolution of May 31, 1870, made a separate and independent grant, or a grant subsequent to the grant provided for in the act of Congress approved July 2, 1864; but these defendants submit that the act of Congress approved July 2, 1864, as amended by the joint resolution of Congress approved May 31, 1870, provided for the location and construction of the main line of the Northern Pacific Railroad to some point on Puget Sound via the valley of the Columbia River, with the privileges, grants and duties provided for in the act of Congress approved July 2, 1864, with the right to locate and construct a branch line from some

convenient point on its main trunk line across the Cascade mountains to Puget Sound, with like privileges, grants and duties, and that the said grant to aid in the construction of the main line of said road extending via the valley of the Columbia River and to Puget Sound, constituted one continuous and undivided grant.

X.

These defendants deny that on the 13th and 23d days of May, 1895, and at all, or any other time subsequent to the 29th day of September, 1890, the lands described in the bill of complaint herein were forfeited to the United States and deny that the United States were the sole and exclusive owners thereof in fee or at all, or of any thereof; and deny that the said lands, or any thereof, were held by the United States; and deny that at any time prior to the issuance and delivery of the patents therefor to the said Northern Pacific Railroad Company, the officers in the Interior Department of the United States, and the President of the United States, were deprived of and possessed no legal right, power, or authority to convey the said lands or any part thereof, to the said company, but aver the fact to be that under the terms and provisions of the said act of Congress approved July 2, 1864, and the joint resolution of Congress approved May 31, 1870, the said officers of the Interior Department of the United States and the President of the United States, were authorized, and it became and was their duty to issue letters patent under the great seal of the United States, conveying and confirming the title to the said lands to the said Northern Pacific Rail-

road Company. These defendants deny that the officers of the Interior Department of the United States and the President of the United States, were ignorant or misinformed as to any of the facts with reference to said lands, and deny that said lands have been forfeited to the United States by the said act of Congress approved September 29, 1890, and deny that the said lands had been appropriated prior to the joint resolution of May 31, 1870, and deny that the same were exempt from the operation of the said grant to the said Northern Pacific Railroad Company. And these defendants admit that the said officers, believing (and said defendants submit, rightfully believing) that the said lands were properly patentable to the Northern Pacific Railroad Company by virtue of the aforesaid acts and joint resolution of Congress, and that the same were unappropriated at the time of the construction of the said line of road between Tacoma, Washington, and Portland, Oregon (which said road was constructed as hereinbefore set forth, and at no other time whatsoever), and that the said lands were subject to the said grant and passed to the said Northern Pacific Railroad Company by virtue of said grant issued and delivered to the said Northern Pacific Railroad Company on or about the 23d and 27th days of May, 1895, patents in due form of law confirming to said Northern Pacific Railroad Company the legal title to the said described lands; but these defendants deny that the said officers were mistaken and misinformed of the facts concerning the condition of said lands or the construction of said road; and deny that said letters patent were is-

sued by mistake or inadvertance, and deny that the said patents were issued to the said company without any consideration whatever other than the pretended claim of the said railroad company to the said land by virtue of the said grants, but defendants aver that said letters patent were issued to the said company under the terms and provisions of the said acts and joint resolutions of Congress, and in consideration of the compliance of the said Northern Pacific Railroad Company with the terms, provisions and conditions of the said acts and joint resolutions.

XI.

Defendants admit that on or about the 27th day of April, 1896, and on or about the 13th day of August, 1896, the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, made demand in writing upon the Northern Pacific Railroad Company for the reconveyance of the lands described in said bill of complaint; that said demands were made substantially as set forth in paragraph 12 of said bill, and that the said company declined to make such reconveyance substantially as set forth in said paragraph 12 of said bill, and that said defendants still refuse to comply with the demand so made by the Secretary of the Interior through the Commissioner of the General Land Office, and defendant admits that it has refused and still refuses to relinquish or reconvey said lands, or any thereof, or to surrender the patents issued by the said Department, but denies that said patents were issued wrongfully or erroneously.

XII.

These defendants deny that the said patents to the said Northern Pacific Railroad Company were erroneously issued, and deny that the said patents and the said deed of sale made to the said Northern Pacific Railway Company clouds, or that there now exists by reason thereof, a cloud upon the title of the United States to the said lands, or any thereof, and deny that the said United States has any title in or to any part or parcel of said lands.

XIII.

And these defendants by protestation, not confessing all or any of the matters and things in conplainant's bill of complaint mentioned and contained, to be true in the manner and form as the same are therein set forth and alleged, or otherwise than as hereinbefore set out and alleged and not waiving, contradicting or denying any of the matters or things hereinbefore alleged, but wholly relying thereon, for further answer and for plea to the whole of said bill say:

(a.) That prior to the issuance of said patents confirming to the said Northern Pacific Railroad Company the lands described in the bill of complaint herein, the said United States required the said Northern Pacific Railroad Company to pay to it, and the said Northern Pacific Railroad Company did pay to it, and the said United States accepted and received the sum of $———, for the purpose of reimbursing the said United States for the cost of surveying the lands described in said bill of complaint, and of preparing and issuing to said railroad company said letters patent; that the said

United States has not refunded or offered to refund to said railroad company, or to its representatives or successors in interest, or to anyone in its or their behalf, said sums of money, or any part thereof, but still retains the same.

(b.) Defendants further say that the said United States at all times prior to July 18, 1895, construed and interpreted the act of Congress approved July 2, 1864, and the acts and joint resolutions supplemental thereto and amendatory thereof, as conveying to said company all lands within the limits of the grants coterminus with the line of said Northern Pacific Railroad as definitely located from Portland, Oregon, northwardly to Puget Sound, which were public lands of the United States not reserved, sold, granted, or otherwise appropriated, and which were free from pre-emption or other claims or rights at the time when the line of said road coterminus therewith was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, and so construed said grant that the lands coterminus with the general route of said road extending between Portland, Oregon, and Wallula, Washington, were not excepted or excluded from the grant made to aid in the construction of that portion of the road extending from Portland, Oregon, northwardly to Puget Sound, and at all times prior to said date of July 18, 1895, said United States construed and interpreted the said act of Congress approved September 29, 1890, as leaving unmodified and unaffected the title to all lands which were coterminus with the constructed line of said Northern Pacific rail-

road extending from Portland, Oregon, northwardly to Puget Sound; that the said railroad company and its representatives relied upon this interpretation of said laws by the said United States; that at the date when the line of said railroad authorized to be constructed by the act of July 2, 1864, and the joint resolution of May 31, 1870, was definitely fixed, and at the date when the letters patent for the lands described in the bill of complaint were issued, there were vacant public indemnity lands from which said railroad company could have selected other lands in lieu of those described in said bill, but relying upon the said interpretation of said acts and joint resolution of Congress as aforesaid, and (if such interpretation was erroneous) misled thereby, and relying upon the said letters patent, the said Northern Pacific Railroad Company and its representatives failed and neglected so to do.

Defendants further say, that after the lines of the said railroad and telegraph were definitely fixed and the said road constructed, and at divers times prior to July 18, 1895, the said United States interpreting said acts and joint resolutions of Congress as aforesaid, reserved, sold, granted and otherwise disposed of large quantities of public indemnity lands coterminus with said lines so authorized to be located and constructed under the terms and provisions of said act of July 2, 1864, and said joint resolution of May 31, 1870, and did not retain sufficient public indemnity lands to indemnify its grantee under the act of 1864, and the joint resolution of May 31, 1870, for said lands, and there does not now remain any lands within said indemnity lines from which said grantee can obtain

indemnity in lieu of the lands described in said bill, and defendants submit that the said complainant ought not now to be heard to say that said lands were wrongfully patented to said company.

(c) Defendants further say that at the date when the line of said Northern Pacific railroad authorized to be constructed under the terms and provisions of said act of July 2, 1864, and said joint resolution approved May 31, 1870, was definitely fixed and indicated upon a plat filed in the office of the Commissioner of the General Land Office, large quantities of lands within the place limits of said grant had been reserved, sold, granted or otherwise disposed of, and said company was compelled to resort to the lands within the indemnity limits to make good the quantity of lands granted to it to aid in the construction of said railroad and telegraph lines. That the United States, disregarding its contract in that behalf, did not cause the lands granted by the act of Congress of July 2, 1864, and the joint resolution of May 31, 1870, to be surveyed as fast as required by the construction of said Northern Pacific Railroad, and neglected and refused to adjust said grant or to ascertain and determine what lands were excepted from said grant and what passed thereunder, and a large portion of said grant is yet unsurveyed and still other large portions thereof unadjusted; that because of such failures on behalf of said United States, said grantee, under the said act of July 2, 1864, and said joint resolution of May 31, 1870, has been greatly hindered and delayed in and prevented from making selections of lands in lieu of the losses for which it is authorized to take indemnity. That

while the United States has thus hindered, delayed and prevented the securing of indemnity lands by its said grantee for the losses for which it was and is entitled to have indemnified it, the said United States, disregarding its contract with the said grantee in that behalf, has reserved, sold, granted and otherwise disposed of, to others than to said grantee, large quantities of land, both surveyed and unsurveyed, within the indemnity limits, and there does not now remain within such indemnity limits a sufficient quantity of lands undisposed of to enable said grantee to obtain from the said United States, or the United States to convey to said grantee, the quantity of lands which, by virtue of said act and joint resolution, the said grantee was to receive and the said United States was to convey in consideration of the construction of said railroad and telegraph lines.

And defendants aver that both the quantity of lands thus reserved, sold, granted or otherwise disposed of by the said United States, within the said indemnity limits, since the location and construction of said railroad, coterminus therewith, and the area of the deficiency in said grant, is greatly in excess of the area of the lands described in complainant's bill of complaint and that the amounts received by the said United States in consideration of such sales, grants and other disposition of the lands so wrongfully sold, granted or otherwise disposed of by the United States, is vastly in excess of the Government price and of the value of the lands described in said bill.

(d) That the said defendant, the Northern Pacific Railway Company, purchased the lands described in said

bill of complaint and which had not theretofore been conveyed by the said Northern Pacific Railroad Company and its representatives, from the said Northern Pacific Railroad Company, paying therefor large sums of money; that the said railway company so purchased the said lands in good faith, without any notice or knowledge of any defect in the title of said Northern Pacific Railroad Company therein or thereto, or in the title acquired by said railway company from said railroad company, it the said railway company, believing that the said railroad company was the legal and equitable owner of said lands and of each and all thereof, and vested with full right to convey the same.

All of which matters and things these defendants aver to be true, and they plead the same to the said bill and to the relief therein demanded. And these defendants say that they do not now claim any right, title or interest in or to the lands described in said bill of complaint or any thereof, which have been heretofore sold or conveyed as hereinbefore set forth, and these defendants disclaim all right, title and interest to the said estate and premises, and to every part thereof.

And further answering defendants deny each and every allegation in complainant's bill of complaint herein contained, except as hereinbefore in this answer admitted or alleged to be true.

And having thus made answer to said bill these defendants pray to be hence dismissed with their costs.

CROWLEY & GROSSCUP,

F. M. DUDLEY,

Solicitors for Defendants, the Northern Pacific Railroad Company and Northern Pacific Railway Company.

Exhibit "A."

Date of Contract.	Names of Grantees.	Part of Section.
July 21, 1891,	Lewis J. Mosier,	S. ½ of SW. ¼,
Aug. 12, 1891,	Leonard Dake,	Lot 1,
July 31, 1891,	William H. H. Taylor,	W. ½ of NW. ¼,
Sept. 24, 1891,	George C. Hitchcock,	SW. ¼ of SE. ¼,
July 11, 1891,	Martin H. Kendig,	NW. ¼ of SE. ¼,
Aug. 27, 1891,	Carrie Anderson,	NW. ¼ of NW. ¼,
Aug. 18, 1891,	Charles H. Crawford,	E. ½ of NW. ¼,
Oct. 14, 1891,	George Lamson,	NE. ¼ of SW. ¼,
Aug. 13, 1891,	Charles M. Landerholm,	N. ½ of NE. ¼,
June 9, 1893,	School Dist. No. 46 Clark Co.,	SW. ¼ SW. ¼ NE. ¼ NW. ¼,
Sept. 24, 1891,	Paul Schultze,	S. ½ of NE. ¼,
Sept. 8, 1891,	Ira E. Spencer,	NE. ¼,
Aug. 27, 1891,	Thomas O'Hara,	S. ½ of NE. ¼,
Aug. 12, 1891,	Elias Carlson,	S. ½ of NW. ¼,
Aug. 18, 1891,	Edmond J. Anrys,	Lots 1 & 2, & S. ½ NE. ¼,
July 15, 1891,	Ferdinand Paeschel,	N. ½ NE. ¼ & SW. ¼ NE. ¼,
Nov. 17, 1891,	Dorothea Maetz,	SE. ¼ of NE. ¼,
Aug. 11, 1891,	Ferdinand Paeschel,	NE. ¼ of SW. ¼,
Aug. 18, 1891,	Charles L. Forbes,	E. ½ of SW. ¼,
Aug. 27, 1891,	Thomas W. Alexander,	NW. ¼ NE. ¼ & NE. ¼ NW. ¼
June 29, 1891,	William H. Payne,	NW. ¼ of NE. ¼,
June 29, 1891,	William H. Payne,	NE, ¼ of NW. ¼,
Sept. 16, 1891,	Ursula Roeffler,	NE. ¼ of SW. ¼,
July 21, 1891,	H. Clarence Clark,	N. ½ of NW. ¼,
July 16, 1891,	George E. Smith,	NW. ¼ of NW. ¼,
July 8, 1891,	John F. Cox,	NE. ¼ of SE. ¼,
July 31, 1891,	Alexander P. Farrar,	NE. ¼ of NE. ¼,
Aug. 12, 1891,	Elvira McKee,	SW. ¼ of SE. ¼,
Aug. 12, 1891,	Albert M. Blaker,	W. ½ NE. ¼ & SE. ¼ NE. ¼,
Nov. 17, 1891,	Gustavus A. Pierce,	N. ½ of NW. ¼,
Aug. 13, 1891,	Lorenzo Fries,	S. ½ of SE. ¼,
Aug. 13, 1891,	Allen Fish,	N. ½ of NE. ¼,

Sec.	Tp.	Rg.	Acres.	Amt. of Purchase Price.	Amt. Paid to N. P. R. R. Co.	Amt. Paid to Receivers N. P. R. R. Co.	Date of Deed.
1	2	2	80.	$560.	$560.		Aug. 1, 1894
21	2	2	13.20	158.40	158.40		Nov. 6, 1891
23	2	2	80.	400.	160.	$240.00	July 25, 1896
23	2	2	40.	400.	80.	320.	Aug. 1, 1894
25	2	2	40.	400.	160.	240.	July 11, 1896
5	3	2	38.42	268.94	268.94		Aug. 27, 1891
5	4	2	76.03	304.12	304.12		Aug. 18, 1891
5	4	2	40.	180.	180.		Oct. 14, 1891
7	4	2	80.	400.	400.		Aug 13, 1891
9	4	2	2.50	10.	10.		Aug. 1, 1894
17	4	2	80.	208.	208.		Sept. 24, 1891
21	4	2	160.	416.	416.		Sept. 8, 1891
25	4	2	80.	208.	208.		Aug. 27, 1891
3	5	2	80.	400.	400.		Aug. 12, 1891,
5	5	2	162.07	421.40	421.40		Aug. 18, 1891
27	5	2	120.	312.	312.		July 15, 1891
27	5	2	40.	104.	104.		Nov. 17, 1891
27	5	2	40.	104.	104.		Aug. 11, 1891
31	5	2	80.	320.	320.		Aug. 29, 1891
35	5	2	80.	320.	32.	288.	April 18, 1895
33	2	3	40.	200.	80.	120.	July 6, 1896
33	2	3	40.	104.	104.		June 29, 1891
35	2	3	40.	160.	160.		Sept. 16, 1891
29	3	3	80.	400.	400.		Jan. 5, 1892
33	3	3	40.	280.	112.	168.	Aug. 1, 1894
33	3	3	40.	200.	200.		July 8, 1891
3	4	3	29.70	118.80	22.46	96.34	July 20, 1896
35	5	3	40.	200.	200.		Aug. 12, 1891
17	5	3	120.	312.	312.		Aug. 12, 1891
17	5	3	80.	208.	208.		Nov. 17, 1891
17	5	3	80.	208.	208.		Aug. 13, 1891
29	5	3	80.	208.	208.		Aug. 13, 1891

Oct. 27, 1891,	Jane Cahill,	S. ½ SW. ¼ & S. ½ of SE. ¼,
Sept. 8, 1891,	James S. P. Christy,	NE. ¼ of NW. ¼,
Oct. 14, 1891,	Robert J. Crawford,	S. ½ of NW. ¼,
Aug. 29, 1891,	Julia E. Brown,	SE. ¼ SW. ¼ & SW. ¼ SE. ¼,
Aug. 27, 1891,	Henry Henriksen,	SW. ¼ of NW. ¼,
June 22, 1891,	Hampton C. Blackwood,	W. ½ of NW. ¼,
Aug. 12, 1891,	Charles E. Holtgreive,	E. ½ of NE. ¼,
June 29, 1891,	James Meehan,	SE. ¼ of NW. ¼,
Dec. 31, 1891,	Frank F. Empaytaiz,	SW. ¼ of NE. ¼,
June 22, 1891,	James Russell,	Lot 8,
Aug. 12, 1891,	Fritz Kettler,	SE. ¼,
Aug. 11, 1891,	James Wilson,	W. ½ NE. ¼ & NW. ¼ SE. ¼,
Aug. 13, 1891,	Thomas Wilson,	E. ½ NW. ¼ & NE. ¼ SW. ¼,
Aug. 27, 1891,	Lasse T. Pedersen,	N. ½ of NW. ¼,
Mar. 22, 1892,	Lester M. Love,	SW. ¼ of SW. ¼,
Nov. 6, 1891,	Thomas Horn,	NE. ¼ of NE. ¼,
Aug. 10, 1875,	S. G. Reed,	All,
Oct. 22, 1891,	Peter Nelson,	NW. ¼ of SE. ¼,

Exhibit "B."

Date of Contract.	Names of Grantees.	Part of Section.
Aug. 13, 1891,	Thomas Rasmussen,	W. ½ of NE. ¼,
Aug. 27, 1891,	Lillie Farrier,	W. ½ of SW. ¼,
Nov. 17, 1891,	Herman Maetz,	W. ½ SE. ¼ & NE. ¼ SE. ¼,
Aug. 27, 1891,	George A. Whipple,	E. ½ SW. ¼ & SW. ¼ SE. ¼,
Aug. 27, 1891,	George A. Whipple,	W. ½ of SW. ¼,
Sept. 8, 1891,	Caroline Reichard,	NE. ¼ of NW. ¼,
Sept. 9, 1891,	Joseph Louis Kammenzine,	NW. ¼ of NW. ¼,
Sept. 8, 1891,	Calvrey E. Mackey,	SW. ¼ of SE. ¼,

29	5	3	160.	640.	640.		Oct. 27, 1891
31	5	3	40.	160.	160.		Sept. 8, 1891
17	2	4	80.	400.	40.	360.	Oct. 14, 1895
19	2	4	80.	320.	320.		April 14, 1892
21	2	4	40.	160.	160.		Aug. 27, 1891
29	2	4	80.	800.	800.		June 22, 1891
23	3	1	80.	560.	560.		Aug. 12, 1891
23	3	1	40.	104.	104.		June 29, 1891
3	5	1	40.	200.	200.		Dec. 31, 1891
11	5	1	31.20	81.12	81.12		June 22, 1891
13	5	1	160.	416.	416.		Aug. 12, 1891
23	5	1	120.	408.	408.		Aug. 11, 1891
23	5	1	120.	328.	328.		Aug. 13, 1891
27	5	1	80.	400.	400.		Aug. 27, 1891
27	5	1	40.	120.	120.		Mar. 22, 1892
33	5	1	40.	104.	104.		Nov. 6, 1891
23	8	1	640.	4160.	Amt. paid in bonds under first receivership.	4160.	Aug. 12, 1895
19	5	2	40.	280.	280.		Mar. 1, 1893
			4033.12		12,142.44	5992.34	
				18,134.78			

Sec.	Tp.	Rg.	Acres.	Amt. of Purchase Price.	Amt. Paid to N. P. R. R. Co.	Amt. to Receivers N. P. R. R. Co.	Amt. Paid to N. P. Ry. Co.	Date to Deed.
5	4	2	75.38	$376.90	$ 37.69	$ 75.38	$263.83	Jan. 2, 1897
9	4	2	80.	400.	80.	240.	80.	Sept. 4, 1896
27	5	2	120.	360.	72.	216.	72.	Nov. 27, 1896
19	2	3	120.	480.	96.	288.	96.	Nov. 23, 1896
19	2	3	67.28	1008.80	201.76	605.28	201.76	Nov. 23, 1896
33	5	3	40.	160.	32.		128.	June 14, 1897
3	5	1	38.38	191.90	77.97	69.85	44.08	Sept. 10, 1896
33	4	3	40.	200.	40.	120.	40.	Aug. 21, 1897
			581.04	31.7760	637.42	1614.51	925.67	

Exhibit "C."

Date of Contract.	Names of Grantees.	Part of Section
Sept. 8, 1891,	George Hardy,	SE. ¼ of SE. ¼,
July 31, 1891,	J. J. Smith,	NE. ¼ of SW. ¼,
Sept. 8, 1891,	Lewis J. Mosier,	NW. ¼, of SW. ¼,
Nov. 17, 1891,	J. J. Davey & Frederick Davey,	SE. ¼ of SE. ¼,
Sept. 8, 1891,	James R. McQueen,	SW. ¼ of NE. ¼,
Oct. 3, 1895,	August Sprick,	SE. ¼, of NE. ¼,
Mar. 24, 1896,	Robert Blair,	NE. ¼ of SE. ¼,
July 21, 1891,	Henry Groth,	SW. ¼ of SE. ¼,
Oct. 14, 1891,	John H. Beherns,	SE. ¼ of SE. ¼,
Aug. 27, 1891,	William T. Hodgkiss,	NE. ¼ of NE. ¼,
Sept. 4, 1891,	Charles M. Wiberg,	E. ½ of NW. ¼,
July 21, 1891,	Charles Peterson,	SE. ¼ of SW. ¼,
Aug. 27, 1891,	Washington I. Stoddard,	N. ½ of NW. ¼,
Sept. 24, 1891,	Paul Schultze,	NE. ¼ of SE. ¼,
Aug. 20, 1891,	John Asmus,	W. ½ of SE. ¼,
Aug. 20, 1891,	George W. Armstrong,	W. ½ of SW. ¼,
July 11, 1892,	Helena S. Green and Isaac W. Rowland,	N. ½ of NW. ¼,
Aug. 14, 1895,	Roswell R. Patch,	SE. ¼ of NW. ¼,
Oct. 8, 1891,	Cornelius D. Hinman,	SW. ¼ of SE. ¼,
Aug. 22, 1891,	Olif Shintaffer,	NE. ¼ of NE. ¼,
Sept. 4, 1891,	Terence Minogue,	SW. ¼ of SW. ¼,
Feb. 4, 1896,	John H. Hart,	NW. ¼ of NW. ¼,
Feb. 4, 1896,	William Osborn,	SW. ¼ of NW. ¼,
July 8, 1891,	Walter A. Price,	E. ½ NW. ¼ & SW. ¼ NW. ¼,
July 11, 1893,	Louis Kettler,	NW. ¼ of SW. ¼,
Aug. 13, 1891,	Richard Waldon,	S. ½ of SW. ¼,
Sept. 30, 1891,	John Gibson,	NE. ¼,
Oct. 31, 1891,	James Davis,	NW. ¼ of SW. ¼,
Aug. 13, 1891,	John K. Think,	SE. ¼ of NW. ¼,
Aug. 12, 1891,	John C. Gullette,	NE. ¼ of NW. ¼ and NW. ¼ of NW. ¼,

Sec.	Tp.	Rg.	Acres.	Amt. of Purchase Price.	Amt. Paid to N. P. R. R. Co.	Amt. Paid to Receivers N. P. R. R. Co.	Amt. Paid to N. P. Ry. Co.
1	3	1	40.	$200.00	$ 20.	$ 60.	$ 40.
1	2	2	40.	400.	160.	88.	
1	2	2	40.	400.	80.	80.	
23	2	2	40.	280.	56.	56.	
25	2	2	40.	400.	80.	158.65	
25	2	2	40.	400.		40.	
25	2	2	40.	240.		24.	
25	2	2	40.	400.	80.		
25	2	2	40.	400.	40.		
29	3	2	40.	520	104.	208.	
7	4	2	80.	400.	80.	78.11	14.11
7	4	2	40.	140.	76.98		
13	4	2	80.	320.	64.		
17	4	2	40.	160.	32.	32.04	
17	4	2	80.	320.	64.	64.	
19	4	2	75.28	376.40	150.56		
27	4	2	80.	400.	40.		
33	4	2	40.	320.		108.	53.80
3	5	2	40.	200.	40.	41.60	
13	5	2	40.	180.	36.	72.	
13	5	2	40.	160.	32.	55.77	
21	5	2	40.	174.		29.	
21	5	2	40.	174.		29.	
27	5	2	120.	480.	48.		
27	5	2	40.	400.	80.		
27	5	2	80.	320.	64.		
33	5	2	160.	920.	185.48	453.23	
33	5	2	40.	160.	16.		
35	5	2	40.	160.	16.	47.04	32.
3	1	3	76.48	382.40	76.48	32.55	

Sept. 16, 1891,	George Dreher,	N. ½ of NW. ¼,
Aug. 27, 1891,	Patrick Reilly,	N. ½ SE. ¼ & SE. ¼ SE. ¼,
Jan. 6, 1896,	Alfred Strunk,	NW. ¼ of SE. ¼,
Nov. 17, 1891,	Jermiah M. Crowson,	SE. ¼ of NE. ¼,
Aug. 27, 1891,	Martin H. Kendig,	NE. ¼ of NE. ¼,
Sept. 16, 1891,	Ursula Roffle,	SW. ¼ of NE. ¼,
Nov. 29, 1895,	Charles E. Shaw,	SW. ¼ of NW. ¼,
Nov. 29, 1895,	Frank Atwood,	SE. ¼ of NW. ¼,
Nov. 29, 1895,	Robert Shaw,	NE. ¼ of SW. ¼,
Nov. 29, 1895,	Charles E. Shaw,	NW. ¼ of SW. ¼,
Jan. 21, 1896,	Andrew Brown,	NE. ¼ of NE. ¼,
Sept. 8, 1891,	Carl Stutz,	N. ½ of NW. ¼,
Mar. 17, 1894,	Alex Mattson,	SW. ¼ of NW. ¼,
Aug. 27, 1891,	Henry Schroder,	S. ½ of NE. ¼,
Nov. 25, 1891,	John R. Bird,	W. ½ of SW. ¼,
Nov. 9, 1894,	George G. Wickson, Sr.,	SE. ¼ of SE. ¼,
Aug. 22, 1891,	Daniel Curtis,	SE. ¼ NE. ¼ & SW. ¼ NE.
Jan. 24, 1896,	Jessie Harrison,	NE. ¼ of NW. ¼,
July 31, 1891,	William Cahill,	E. ½ of SE. ¼,
Mar. 4, 1892,	William Cahill,	W. ½ of SE. ¼,
June 22, 1891,	Mary Cahill,	NE. ¼ of SE. ¼,
Sept. 24, 1891,	Elvira McKee,	SE. ¼ of SE. ¼,
Sept. 24, 1891,	Daniel Crowley,	NE. ¼ of SE. ¼,
Oct. 20, 1891,	Columbus L. Hutchinson,	NE. ¼ of SE. ¼,
Sept. 8, 1891,	Henry Hess,	W. ½ of SW. ¼,
Jan. 10, 1896,	Jorgen Henriksen,	NE. ¼ of SE. ¼,
	and Henrik Henriksen,	NW. ¼ of NW. ¼,
Nov. 25, 1891,	John F. Blackwood,	SE. ¼ of SE. ¼,
Aug. 27, 1891,	Christian Schlegel,	E. ½ of NW. ¼,
Jan. 30, 1892,	Samuel Berger,	NE. ¼ of SW. ¼,
Mar. 22, 1892,	John Loeffel,	SE. ¼ of SW. ¼,
Sept. 8, 1891,	Christian C. Anderson,	Lot 1,
June 22, 1891,	James S. Neill,	W. ½ of SW. ¼,

9	2	3	80.	320.	64.	64.	
13	2	3	120.	360.	72.	207.07	
19	2	3	40.	240.		40.	40.
25	2	3	40.	200.	152.	18.96	
31	2	3	40.	298.80	151.98		
35	2	3	40.	600.	60.		
5	3	3	40.	200.		20.	
5	3	3	40.	200.		20.	
5	3	3	40.	200.		20.	
5	3	3	40.	160.		16.	
19	3	3	40.	240.		40.	
27	3	3	80.	320.	64.	192.	
29	3	3	40.	400.		160.	80.
33	3	3	80.	400.	80.	240.	
35	3	3	80.	800.	80.		
29	4	3	40.	320.		64.	
31	4	3	80.	400.	80.	80.	
33	4	3	40.	160.		30.	
9	5	3	80.	400.	80.	240.	
9	5	3	80.	240.	48.	144.	
15	5	3	40.	400.	159.60	160.	
15	5	3	40.	200.	120.	60.	
17	5	3	40.	400.	40.	40.	
31	5	3	40.	160.	16.	48.	16.
17	2	4	80.	320.	32.	34.70	85.
19	2	4	40.				
21	2	4	40.	240.		40.	
19	2	4	40.	400.	80.	80.	
29	2	4	80.	320.	64.	192.	
29	2	4	40.	400.	40.		
29	2	4	40.	400.	40.		
31	2	4	31.98	319.80	63.96	191.88	
1	3	1	80.	480	192.	192.	

Dec. 8, 1891,	Peter Moore,	SE. ¼ of NW. ¼,
Oct. 17, 1895,	Michael Brown,	SW. ¼ of SE. ¼,
July 8, 1891,	William Tenney,	W. ½ of NE. ¼,
Nov. 9, 1894,	Mary E. Baker,	NE. ¼ of SW. ¼,
Aug. 7, 1893,	Charles Johnson,	NE. ¼ of SE. ¼,
Aug. 11, 1891,	Swan Johnson,	E. ½ of SW. ¼,
Nov. 20, 1891,	August Schuerman,	NE. ¼ of SW. ¼,
Aug. 20, 1891,	James Barr,	W. ½ of SW. ¼,
Aug. 27, 1891,	Carl Zuhl,	SE ¼ of SE. ¼,
Aug. 27, 1891,	Francis M. Greathouse,	SE. ¼,
Sept. 2, 1891,	Simon Johenson,	NE. ¼ of NE. ¼,
July 10, 1891,	H. C. Gabrielson,	W. ½ of SW. ¼,
Nov. 30, 1891,	H. C. Gabrielson,	SE. ¼ of SW. ¼,
July 27, 1891,	Henry J. Nixstad,	W. ½ of NW. ¼,
Oct. 14, 1891,	Olans S. Moe,	NE. ¼ of SW. ¼,
Feb. 8, 1895,	Mrs. Neila M. Olsen,	SE. ¼ of SW. ¼,
July 19, 1893,	William E. Young,	SW. ¼, NE. ¼ & NW. ¼ SE. ¼,
Sept. 4, 1891,	Charles M. Wiberg,	W. ½ of NW. ¼,
July 21, 1891,	Charles Peterson,	SW. ½ of SW. ¼,
Aug. 5, 1891,	Peter N. Moe,	S. ½ NW. ¼ & NE. ¼ SW. ¼,
Aug. 10, 1891,	Martin S. Moe,	NW. ¼ of SW. ¼,
Aug. 17, 1891,	Abraham Meister,	NE. ¼ of SE. ¼,
Aug. 18, 1891,	Johanna Holmberg,	Lots 3 and 4,
Jan. 29, 1896,	William M. Strunk,	SW. ¼ of NW. ¼,

11	3	1	40.	600.	120.		
11	3	1	40.	240.		120.	
23	3	1	80.	560.	112.	168.	
1	4	1	40.	320.		64.	
1	4	1	40.	400.	100.	75.	
13	5	1	80.	240.	48.	48.	
15	5	1	40.	320.	32.	64.	
15	5	1	80.	300.	30.	30.	
15	5	1	40.	120.	48.	41.41	3.36
21	5	1	160.	640.	128.	128.	
23	5	1	40.	120.	24.		
23	5	1	80.	240.	96.	48.	
23	5	1	40.	320.	32.	94.32	
25	5	1	80.	560.	224.		
25	5	1	40.	320.	32.	32.	
25	5	1	40.	320.		64.	
33	7	1	80.	260.	52.	55.09	105.79
7	4	2	75.11	375.55	75.11	73.35	13.26
7	4	2	37.68	131.88	82.53		
19	5	2	120.67	602.68	120.56		
19	5	2	41.01	287.07	113.76		
19	5	2	40.	160.	32.		
31	5	2	80.60	322.40	128.96		
19	2	3	33.76	202.56		33.76	33.76
			4932.57	28,247.54	5131.96	5521.53	517.08

[Endorsed]: Filed in the United States Circuit Court, October, 4, 1897. A. Reeves Ayres, Clerk. By Sam'l D. Bridges, Deputy.

And afterward, to wit, on the 14th day of December, 1898, there was duly filed in said court, in said cause, a replication in the words and figures following, to wit:

In the Circuit Court of the United States, for the District of Washington, Western Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY (a Corporation), and NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendants. } No. 351.

Replication.

The replication of the United States of America, plaintiff, to the joint and several answers of the Northern Pacific Railroad Company and the Northern Pacific Railway Company to bill of complaint.

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefits and advantages of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the said joint and several answer of the Northern Pa-

cific Railroad Company and the Northern Pacific Railway Company, and for replication thereunto, says: That it will aver, maintain and prove its said bill of complaint to be true, certain, and sufficient in the law to be answered unto; and that said joint and several answer of the Northern Pacific Railroad Company and Northern Pacific Railway Company is very uncertain, evasive, and insufficient in law to be replied unto by repliant without that, that any other matter or thing whatsoever, in the said joint and several answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by its said bill of complaint it hath already prayed.

WILSON R. GAY,
United States Attorney.

[Endorsed]: Filed in the United States Circuit Court, December 14, 1898, A. Reeves Ayres, Clerk. By Sam'l D. Bridges, Deputy.

And afterwards, to wit, on the 4th day of August, 1899, there was duly filed in said court, in said cause, a stipulation to amend, in the words and figures following, to wit:

Circuit Court of the United States, for the District of Washington, Western Division.

UNITED STATES OF AMERICA,
Complainant,
vs.
NORTHERN PACIFIC RAILROAD COMPANY and NORTHERN PACIFIC RAILWAY COMPANY,
Defendants.
No. 551.

Stipulation to Amend Answer.

It is hereby stipulated by and between the parties hereto, by their respective solicitors, that the answer of the defendants may be amended by adding at the end of the third paragraph thereof, the following

"That the several parcels of land so described in said schedules marked Exhibits "A," "B," and "C," and all thereof, were purchased by the respective persons named as purchasers in said exhibits for a valuable consideration and in good faith, as part of the grant to said Northern Pacific Railroad Company.

And that an order may be entered allowing said

amendment and the interlineation thereof in the original answer on file herein.

WILSON R. GAY,
United States Attorney,
Solicitor for Complainant.

JAMES B. KERR, and
H. M. STEPHENS,
Solicitors for Defendants.

[Endorsed]: Filed in the United States Circuit Court, District of Washington. August 4, 1899. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

And afterwards, to wit, on the 4th day of August, 1899, there was duly filed in said court, in said cause, an order, in the words and figures following, to wit:

Circuit Court of the United States, for the District of Washington, Western Division.

UNITED STATES OF AMERICA,
Complainant,
vs.
NORTHERN PACIFIC RAILROAD COMPANY al. NORTHERN PACIFIC RAILWAY COMPANY,
Defendants.
No. 551.

Order Allowing Amendment of Answer.

Upon stipulation of the parties duly filed herein, it is ordered that the answer of the defendants be amended by adding, by interlineation, at the end of the third paragraph thereof the following

"That the several parcels of land so described in said schedules marked Exhibits "A," "B," and "C," and all thereof, were purchased by the respective persons named as purchasers in said exhibits for a valuable consideration and in good faith, as part of the grant to said Northern Pacific Railroad Company.

Done in open Court this 4th day of August, 1899.

C. H. HANFORD,
Judge.

[Endorsed]: Filed in the United States Circuit Court, District of Washington, August 4, 1899. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

And afterwards, to wit, on the 12th day of May, 1900, there was duly filed in said court, in said cause, a stipulation of laws and facts for trial, in the words and figures following, to wit:

In the Circuit Court of the United States, for the District of Washington, Western Division.

UNITED STATES OF AMERICA, Complainant, vs. NORTHERN PACIFIC RAILROAD COMPANY and NORTHERN PACIFIC RAILWAY COMPANY, Defendants.	No. 551.

Stipulation of Laws and Facts for Trial.

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that, for the

purposes of the trial of this action, the following facts shall be taken and deemed to be true:

I.

That at all the times hereinafter mentioned the Northern Pacific Railroad Company was a corporation, organized, created and existing under and by virtue of an act of Congress, approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route."

That by the terms and provisions of said act, said corporation was authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as should be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget Sound, with a branch line via the Valley of the Columbia River, to a point at or near Portland, in the State of Oregon.

II.

That the third section of said act of Congress is in words and figures as follows, to wit:

Sec. 3. And be it further enacted, that there be, and hereby is, granted to the "Northern Pacific Railroad Company," its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy

transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the general land office, and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided, further, that the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate and associate with

said company upon the terms named in the first section of this act: Provided, further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided: And provided, further, that the word "mineral," when it occurs in this act, shall not be held to include iron or coal: And provided, further, that no money shall be drawn from the treasury of the United States to aid in the construction of the said "Northern Pacific Railroad."

And by the fourth section of said Act of Congress, it was provided as follows:

Sec. 4. And be it further enacted, that whenever said "Northern Pacific Railroad Company" shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been completed, constructed, and in readiness as aforesaid, and veri-

fied by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: Provided, that not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying East of the Western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first-class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: Provided, also, that lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act.

And by the sixth section of said act, Congress provided as follows:

Sec. 6. And be it further enacted, that the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An Act to secure homesteads to actual settlers on the "public domain," approved May, twenty, eighteen hundred and sixty-two, shall be, and the same

are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale.

And that the twelfth section of said Act of Congress was and is in words and figures as follows, to wit;

Sec. 12. And be it further enacted, that the acceptance of the terms, conditions, and impositions of this act by the said Northern Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be served on the President of the United States. (13 Stat., 365)

And that the twentieth section of said Act of Congress was and is in words and figures as follows, to wit;

Sec. 20. And be it further enacted, that the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act.

III.

That said railroad company accepted the terms, conditions and impositions of said Act of Congress in writing under its corporate seal, pursuant to the direction of its board of directors first had and obtained, and on the 29th day of December, A. D. 1864, served such acceptance on the President of the United States.

IV.

By joint resolution of April 10, 1869, it was resolved as follows;

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the Northern Pacific Railroad Company be, and hereby is, authorized to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound, to be determined by said company, and also to connect the same with its main line west of the Cascade mountains, in the Territory of Washington; said extension being subject to all the conditions and provisions, and said company in respect thereto being entitled to all the rights and privileges conferred by the act incorporating said company, and all acts additional to and amendatory thereof: Provided, that said company shall not be entitled to any subsidy in money, bonds, or additional lands of the United States, in respect to said extension of its branch line as aforesaid, except such lands as may be included in the right of way on the line of such extension as it may be located: And provided further, that at least twenty-five miles of said extension shall be constructed before the second day of

July, eighteen hundred and seventy-one, and forty miles per year thereafter until the whole of said extension shall be completed. (16 Stat. 57)

V.

That by the joint resolution of May 31, 1870, it was resolved as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgages on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the

United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, Anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points; Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms hereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' pre-

vious notice, in single sections or subdivisions thereof, to the highest and best bidder: Provided, further, that in the construction of the said railroad, American iron and steel only shall be used, the same to be manufactured from American ores exclusively.

Sec. 2. And be it further resolved, that Congress may at any time alter or amend this joint resolution, having due regard to the rights of said company, and any other parties. (16 Stat. 379)

VI.

That the map or plat filed herewith and marked exhibit —— is a true and correct copy of a certain map or plat now in the office of the Commissioner of the General Land Office, which said map or plat was transmitted by Josiah Perham, the President of the Northern Pacific Railroad Company, to the Secretary of the Interior, on the 6th day of March, 1865, together with his letter of transmittal, which is in the words and figures following, to wit:

Washington, D. C., 6 March, 1865.

Hon. John P. Usher, Secretary of the Interior.

Sir: Under authority from the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map, in red ink, the general line of their railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget Sound, in Washington Territory, via the Columbia River, adopted by said company as their line of said railroad, subject only to such variations as may be found necessary after more specific surveys, and I respectfully ask that the same may be filed

in the office of the Commissioner of the General Land Office, together with a copy of the charter and organization of said company, and that under your directions the land granted to said company may be marked and withdrawn from sale, in conformity to law.

I am respectfully your obt. servant,

JOSIAH PERHAM,

President N. P. R. R. Company.

That thereupon the Secretary of the Interior transmitted the original of said map, a copy of which is filed herewith, made a part hereof and marked Exhibit ——, together with said letter of the said Josiah Perham, to the Commissioner of the General Land Office, on March 9, 1865, together with his letter of transmittal, which is in the words and figures following, to wit:

Department of the Interior,

Washington, D. C., March 9, 1865.

Sir: Herewith I transmit a map upon which the "general line" of the Northern Pacific Railroad, as adopted by the Board of Directors of that railroad company, is delineated; also a copy of the letter of the President of said company, dated the 6th inst., requesting that the granted lands along said line be withdrawn from market.

In view of the provisions of the 3d and 6th sections of the act of Congress, approved July 2, 1864 (pamphlet laws, pages 368, 369), should you perceive no objection, I think that the odd-numbered sections along the line, for ten miles in width on each side in Minnesota and Wisconsin and for twenty miles in width on each side along that part of the line extending through the territories west-

ward to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad.

The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of said act of Congress.

Very respectfully your obt. ser't.,

J. P. USHER,

Secretary.

The Commissioner of the General Land Office.

VII.

That upon the receipt by the Commissioner of the General Land Office of the map mentioned in the foregoing paragraph of this stipulation, transmitted to the Secretary of the Interior by Josiah Perham, President of the Northern Pacific Railroad Company, on March 5th, 1865, a copy of which is marked Exhibit ——— of this stipulation said Commissioner, on the 22d day of June, 1865, transmitted a letter relative thereto to the Secretary of the Interior, which is in the words and figures following, to wit:

Department of the Interior,

General Land Office,

June 22d, 1865.

Hon. James Harlan, Secretary of the Interior:

Sir: The late secretary of the interior, under date of the 9th of March last, enclosed to this office a diagram showing the proposed route of the Northern Pacific Railroad, for which a grant of lands was made by the act

approved July 2d, 1864. Statutes at large pamphlet laws 1864, p. 365.

This diagram was filed in the secretary's office accompanied by a request for withdrawal of lands.

As no withdrawal was ordered by the secretary, no action was here taken upon the application.

Mr. Perham, the president of the railroad company, has called attention to the matter, and, submitting it, I have the honor to state:

1st. That the present application deals with the railroad system of granting on the largest scale known to Congressional legislation.

It extends from Lake Superior to the Pacific Ocean, and allowing for probable deflections, may be set down at 2,025 miles in length, taking in alternate sections by estimate 47,360,00 acres, in a belt of 40 miles wide through the territories and 20 miles wide through the states; the general or conjectural course being indicated on the map herewith.

By the opinions of Attorney General Cushing of 19th December, 1856, and 16th February, 1857—Opinions of Atty's General, Vol. 8, pages 244 and 390—and the action of the department, railroad grants take effect from the date when the survey of the route is actually made on the face of the earth.

The evidence required of the route under the established ruling of the department, is a connected map showing the exact location, the map indicating by flagstaffs the progress of the survey, the map to be authenticated by the affidavit of the engineer with the approval of the accredited chief officer of the grantee. That proof

is required to show the precise portions of each section or smallest legal subdivision cut by the route.

In the judgment of the Commissioner, no withdrawal should be ordered until such map is filed in the general land office, and although in the Atty. General's opinion —Mr. Cushing—the right takes hold from the date of actual survey on the ground, yet upon that point this office, with reference to superior legal authority, holds that the grant does not become effective until the map is actually filed in the district land office, where citizens resort to ascertain what is public land and what is not, so that purchases can be made without danger of conflicting title. Yet, even admitting that the right in the railroad grant attaches from the date of such survey, we are without the means of ascertaining and determining the interests of rightful claimants until such map is filed.

Now, in this view, the commissioner reports that no withdrawals should be ordered until the map of actual survey, authenticated as indicated, shall be filed in the district and general land offices.

This may be done starting from the cul de sac of Lake Superior, the eastern initial point of the route, and stretching thence westward to the western boundary of Minnesota, the lines of the public surveys having been that far established.

2d. The same course of proceeding to be had in regard to that portion of the road falling on the western or Pacific side within the range of existing public surveys but

3d. Of course no withdrawal can now be made on account of the road in the region of country extending across that part of the continent between the west bound-

ary of Minnesota to the eastern surveys of Washington Territory, because over that territory the lines of the public surveys have not yet been established.

In this extended locality the withdrawal should only be ordered as the public surveys are advanced and survey of railroad established in like manner as indicated under 1st head.

4th. A general withdrawal upon conjectural or uncertain basis might result in shutting out from settlement large bodies of land which an actual survey should show not within the grant, whilst lands would be omitted from the withdrawal which the survey might require to be included.

Then it is not sound policy nor is there any warrant in our land legislation for doing any act the tendency of which would give preference to satisfying a grant on such a stupendous scale as this, whilst individual claims under our general system of land laws, homestead, preemption and sales, would be unaided by any such preliminary discriminating proceeding.

The result of a premature withdrawal on uncertain basis would be unjust to the pioneer settler, detrimental to the public interests in arresting the progress of settlement and disposal in that direction of the public domain, and to that extent checking the growth and prosperity of our frontier, and that, too, in the vicinity of a colonial dependence of a powerful nation, would be a prejudice to the interests of the railroad grant itself in excluding settlers and immigrants whose labor and means would enhance the value of such lands as in the ordinary

progressive operations of the land system would in due time fall to the grant.

The land system should be so administered that all the different acts of land legislation may be at the same time in full operation—giving precedence to no one law over another, unless where the terms of law indicate the public will to be otherwise, leaving corporate or other grantees and individuals respectively to have the benefit of their superior diligence in establishing and completing their several claims according to law.

For these considerations this office declines ordering a withdrawal until authenticated maps of the actual survey of the several portions of the route shall be successively filed from time to time to completion showing the connection of said portions with the lines of the public surveys, yet respectfully submits the foregoing considerations for such directions as the secretary may be pleased to give in the premises for the government of this office.

With great respect, your ob't. ser't,

JOS. S. WILSON,
Actg. Commissioner.

That the following endorsements appear upon said letter in the words, figures and form, to wit:

Northern Pacific.
Dptmt of Interior.
R 77|377.
Com. Gen. Land Office.
June 22, 1865.
Rec'd June 23, 1865.
Submitting a diagram
Showing the proposed route
of the Northern Pacific
R. Road, &c.
Secy. sustains Comm's
refusal
Department
of the
June 23, 1865
Interior.
One 533
Thompson.

That all of said endorsements are written in ink except the words, "Sec'y sustains Comm's refusal," which said words are written in lead pencil; that the name of the Secretary of the Interior is not signed thereto, nor in any way does the name of said Secretary appear endorsed upon said letter.

VIII.

That the minutes of the Board of Directors of the Northern Pacific Railroad Company from December 7, 1864, which is the date of the first meeting of said Board

of Directors appearing in said minutes, up to the 18th day of May, 1865, do not show any action by said Board of Directors with reference to locating the line of the road of said Northern Pacific Railroad Company under said act of Congress of July 2, 1864, and said minutes do not show any action by said Board of Directors conferring special authority upon the President of said company to locate said line.

That said map marked Exhibit ——— of this stipulation has remained a part of the files of the Interior Department since the date of its filing, and the Northern Pacific Railroad Company never questioned the authenticity of said map, or the authority of its President to file the same in any proceeding before the Land Department of the United States, or in any court, prior to September 22, 1882, upon which date the map of definite location marked Exhibit ——— was filed, as set forth in these stipulations.

That in the year 1890 there was tried in the United States Circuit Court for the District of Oregon an action wherein the United States was plaintiff and the Northern Pacific Railroad Company defendant, brought for the recovery of the value of certain lumber manufactured from logs alleged to have been unlawfully cut and removed by the defendant from public lands; that in said case the Northern Pacific Railroad Company and the plaintiff therein stipulated and agreed, among other things, as follows:

On the 6th day of March, 1865, Josiah Perham, President of the Northern Pacific Railroad Company, ad-

dressed to the Secretary of the Interior a communication in these words:

Under authority from the Board of Directors of the Northern Pacific Railroad Company I have designated on the accompanying map in red ink the "general line" of their railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget Sound, in Washington Territory, via the Columbia river, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific surveys, and I respectfully ask that the same may be filed in the office of the Commissioner of the General Land Office together with a copy of the charter and organization of said company, and that under your directions the lands granted to said company may be marked and withdrawn from sale in conformity to law.

And upon the same, together wtih other statements of facts agreed and stipulated, said case was submitted. That said cause is reported in volume 41, Federal Reporter, page 842, and was afterwards appealed to the Supreme Court of the United States, and is reported in the 152 United States, page 284.

Other than as herein stipulated, the Department of the Interior has never taken any action under or relative to said map or made any withdrawals of land thereunder.

IX.

That the powers of the President of the said Northern Pacific Railroad Company, as conferred by the by-laws of the said company adopted January 11, 1865, are in the words and figures following, to wit:

THE PRESIDENT.

The President shall have power to call meetings of the Board of Directors at such time and place as he shall think proper to appoint, and it shall be his duty to call such meetings whenever requested so to do, in writing, by any three members of the board.

It shall be his duty to preside at all meetings of the board, to appoint all committees not otherwise appointed, to preserve order, promote the regular and speedy transaction of business, and generally to exercise the same supervisory power and direction over all the affairs, departments and employees of the company as are commonly exercised by the presiding officer of such companies.

He shall be a member ex-officio of all such standing and select committees.

All letters, reports and papers of every description received by the secretary or treasurer pertaining to the business of the company shall be submitted to the President, and all instructions emanating from those officers shall be first approved by him, except in cases directed and ratified by the board.

The President shall have the custody of all the official bonds of the company and keep them together as a special deposit subject to the orders of the board.

The President may also exercise such other powers and perform such other duties as the Board of Directors may from time to time confer or prescribe.

X.

That on July 30, 1870, the Northern Pacific Railroad

Co. caused to be filed in the office of the Secretary of the Interior two certain maps, copies of which are hereto attached, marked Exhibits ——— and ———, accompanied by the affidavit of the Chief Engineer of the Northern Pacific Railroad Company and the certificate of the President of that company, being in words and figures as follows, to wit:

State of New York,
County of New York. } ss.

New York City, July 26, 1870.

Edwin F. Johnson, of the City, County, and State of New York, deposes and says that he is the Engineer in Chief of the Northern Pacific Railroad Company, and that he has been such engineer in chief since June, A. D. 1866.

That during the period above named surveys and explorations have been made at various places on the proposed route for said road for determining its proper location, and that in connection with said surveys examinations have been made and information has been collected relative to other portions of said route, sufficient to enable the said company to determine approximately and by reference to appropriate landmarks the proper position for the line of their said road on those portions with a view to the withdrawal from market or from settlement of the lands granted to the said company on either side of their said road.

The portions of the line of the Northern Pacific Railroad, the proper location of which have thus been ascertained, extend the first portion from Lake Superior in the State of Wisconsin to the Columbia River in the Territory

of Washington, a distance, as estimated, of fifteen hundred and ten miles (1510).

This portion is more particularly described as follows, viz:

Commencing in the State of Wisconsin at the mouth of the Montreal river the western boundary of upper Michigan;

Thence on a direct course south of west to the northwest corner of township forty-six (46), range four (4) west, in said Wisconsin, a distance of about twenty-five miles;

Thence in a direct course north of west to a point in the west line of township forty-eight (48) range sixteen (16) west, in Minnesota one and one-half miles south of the northwest corner of said township a distance of about sixty-eight (68) miles;

Thence on a direct and nearly west course through Carlton, Cass, Wadena and Ottertail counties to the northwest corner of township one hundred and thirty-six (136), range thirty-eight (38) west, a distance of about one hundred and fifty miles;

Thence northwestwardly on a direct course through Ottertail, Becker, Clay and Polk counties to a point on the east or right bank of the Red river in the middle line of township one hundred and forty-two (142), range forty-eight (48) west, a distance of about sixty-nine miles;

Thence northwestwardly across the said river into the Territory of Dakota on a direct course to Fort Totten on Lake Miniwaken or Devil's Lake in said Dakota a distance of about one hundred and twenty miles;

Thence in a direction a little to the south or west on a direct line to the isolated butte or mound known as the

Maison du chien in said Dakota, a distance of about ninety miles;

Thence southwestwardly on a direct course across the Missouri River to a point on the west or left bank of the Yellowstone river in Montana situated fifty-two miles in a direct line southerly from Fort Union on the Missouri River, a distance of about one hundred and seventy-nine miles;

Thence southwestwardly on a direct course to a point on the west or left bank of the Bighorn river opposite to the mouth of Tullocks or Muddy creek about seven miles from the Yellowstone River, an estimated distance of one hundred and sixty-six miles;

Thence on a direct course southwestardly to the mouth of Clark's fork a branch of the Yellowstone river in said Montana, a distance of about seventy-four miles;

Thence following up the valley of the Yellowstone river on its south side and parallel nearly with its general course to a point on its east or right bank opposite the mouth of Shields or Twenty-five mile river, a distance of about ninety-five miles;

Thence up the Yellowstone river on its right of east bank, crossing it and entering a valley leading from it to the pass known as Boseman's pass on nearly a direct course to Fort Ellis, a distance of about twenty-two miles. Thence on a direct course westwardly across the Gallatin and Madison rivers to the mouth of Boulder creek of the Jefferson branch of the Missouri river a distance of about forty miles. Thence following up the valley of the Jefferson river southwestwardly and parallel nearly with the general course of said river to the mouth of the Wis-

dom river, a distance as estimated of sixty miles. Thence due west across the main divide of the Missouri and Columbia waters on a direct course to the mouth of the Beaver creek, a branch of the Salmon river near the great bend of the latter in the Territory of Idaho, a distance as estimated of ninety miles. Thence following down the Salmon river in said Idaho, keeping near to it, to a point on its north bank twenty miles from its mouth, a distance as estimated of one hundred and thirty miles. Thence in a northwestwardly direction on a direct course to a point on the east or right bank of the Lewis or Saptin river ten miles north of the point where the boundary line of Washington Territory and Oregon meets that river, a distance as estimated of fifty miles.

Thence on a direct course a little to the south of west crossing the Lewis or Saptin river into Washington Territory to a point on the right or northwesterly bank of the Columbia River opposite to the mouth of the Walla Walla River, a distance as estimated of ninety miles;

Making altogether on this portion a distance of fifteen hundred and ten miles, more or less, from the point of commencement on Lake Superior in Wisconsin to the Columbia River at the mouth of the Walla Walla River in Washington Territory.

Another portion of the line of the Northern Pacific Railroad, the proper location of which has been ascertained as above is situated in Washington Territory, and extends from the international boundary of forty-nine degrees of north latitude southerly along the easterly side of Puget Sound or of the chain of inland tide waters connected with the strait of Juan de Fuca to their south-

ern extremity, thence southerly to the Columbia River and along the eastern and northerly or right bank of that river to a point opposite to the mouth of the Walla Walla River in said Territory.

This portion is more particularly described as follows, viz:

Commencing at the point where said international boundary of forty-nine degrees of north latitude first meets in its course west the tidewaters of the Pacific Ocean;

Thence southwestwardly by the most direct course to the town of Whatcom on Bellingham Bay in said Territory, a distance of about twenty miles;

Thence southeastwardly on a direct course to the middle point of township number thirty-seven (37), range three (3) east of the Willamette meridian a distance of about six miles;

Thence southeastwardly on a direct course to the middle point of township No. thirty (30) range five (5) east of the Willamette meridian a distance of about forty-four miles;

Thence southwestwardly on a direct course to the middle point of township twenty-seven (27), range four (4) east of the Willamette meridian a distance of about twenty miles;

Thence due south on a direct course to the middle point of township twenty-one (21); range four (4) east of the Willamette meridian a distance of thirty-six miles;

Thence southwestwardly on a direct course to the southwest corner of township seventeen (17) range two (2)

west of the Willamette meridian a distance of about forty-two miles;

Thence on a direct course a little east of south to the middle point of the west line of township seven (7), range one (1) west of the Willamette meridian on or near the east or right bank of the Columbia River, a distance of about fifty-two miles;

Thence following the east or right bank of said river on or near the line of high-water mark of the same southerly to the site of Fort Vancouver, and thence across said river to Portland, Oregon, and back to Vancouver, a distance of about thirty-three miles to Portland;

Thence from Fort Vancouver following the right or northerly bank of the said Columbia River on or near the line of high-water mark of the same eastwardly through the Cascade Range of Highlands to a point opposite the mouth of the Walla Walla River a distance of one hundred and ninety miles more or less; making an estimated distance altogether on this portion of the route of four hundred and forty-three miles, and for the aggregate of the two portions as described above, a distance of nineteen hundred and fifty-three miles, more or less.

These two portions of the Northern Pacific Railroad above described are fully exhibited on the two maps respectively hereto appended and signed by the undersigned of even date with this certificate.

EDWIN F. JOHNSTONE,
Eng. in Chf N. Pacific R. R. Compy.

Sworn and subscribed to this twenty-sixth day of July, A. D. 1870.

Before me

[Seal]

W. N. GODDARD,
Notary Public, Co. of N. Y.

It is hereby certified that in pursuance of the Act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the Northern Rroute," and the several acts amendatory thereto, certain portions of the line or route for said road were so far definitely fixed by resolution of the Board of Directors of said company on the eighth day of July, A. D. 1870, as to make it the duty of the President of the said company to request the Honorable the Secretary of the Interior to withdraw or withhold from sale and settlement the public lands to which said company are entitled on either side of the lines of their road so described as aforesaid in the certificate of their engineer in chief.

They therefore respectfully ask that their interests may be protected so far as they can be by a withdrawal of lands as above set forth.

Such protection it is believed is in strict accordance with the intentions of Congress in granting lands to the company for the construction of their road, and will save the company from serious loss or diminution in the value of the grant consequent upon the delay necessary in making the surveys for filing a location in the usual form.

In testimony whereof the Northern Pacific Railroad

Company has caused the same to be signed by its President, and has attached hereunto its corporate seal at the city of New York this twenty-sixth day of July, A. D. 1870.

J. GREGORY SMITH,
President Nor. Pacific R. R. Co.

[Seal] SAM'L WILKESON,
Secretary.

That thereafter, to wit, on the 13th day of August, 1870, the Secretary of the Interior transmitted the same maps to the Commissioner of the General Land Office, together with a letter in words and figures as follows, to wit:

Department of the Interior.
Washington, D. C., August 13, 1870.

Sir: I transmit herewith two maps showing the designated route of the Northern Pacific Railroad.

You will immediately direct the proper local land officers in the States of Wisconsin and Minnesota to withhold from sale, pre-emption, homestead and other disposal the odd-numbered sections not sold, reserved, and to which prior rights have not attached, within 20 miles on each side of the route, and in like manner direct those officers in Washington Territory to withhold such odd-numbered sections as lie south of the town of Steilacoom. The unsurveyed as well as surveyed lands will be included in the reservation, and you will direct the local officers to give notice accordingly; and as the township plats are received by them, they will make the proper note of reservation thereon.

The withdrawal will take effect from the receipt of the order at the local office.

Very respectfully your obedient servant,

J. D. COX,

Secretary.

Hon. JOS. S. WILSON,

Commissioner of the General Land Office.

XI.

That said Northern Pacific Railroad Company caused to be surveyed the line of definite location of that portion of its line of railroad and telegraph line extending from Kalama to Tenino, in the then Territory of Washington, and on the 13th day of Setember, 1873, caused a plat thereof, approved by the Secretary of the Interior, to be filed in the office of the Commissioner of the General Land Office; that a copy of said map is hereunto annexed, marked Exhibit ——, and made a part hereof.

That upon the filing of said map the Commissioner of the General Land Office, acting under the direction of the Secretary of the Interior, caused to be prepared a diagram showing the lands situate within the 40 and 50 mile limits on each side and coterminous with said line of definite location, and, on the 21st day of January, 1874, transmitted said diagram to the United States District Land Officers at Vancouver, Washington, together with a letter in words and figures as follows, to wit:

Department of the Interior.

General Land Office.

Washington, D. C., January 21st, 1874.

Register and Receiver, Vancouver, W. T.

Gentlemen: I transmit herewith a diagram showing the

40 and 50 mile limits of the land grant to the Northern Pacific Railroad Company in your district, as now definitely fixed, and you are hereby directed to withhold from sale or entry all of the odd-numbered sections falling within those limits, not heretofore withdrawn upon the general route of the road, the limits of which are shown on the diagram in green.

The even sections within the 40 mile limits are to be held at the double minimum price of $2.50 per acre, but the even sections between the 40 and 50 mile limits at $1.25 per acre only.

This additional withdrawal of odd sections, and the increase in price of the even sections, takes effect from September 13th, 1873, the date of the filing of the map of definite location in this office by the company.

Be pleased to acknowledge the date of the receipt of this letter.

Very respectfully,

WILLIS DRUMMOND,
Commissioner.

That a copy of said diagram so prepared by the Commissioner of the General Land Office and so transmitted to said District Land Officers, is hereunto annexed, marked Exhibit ——, and made a part hereof.

XII.

That thereafter the said Northern Pacific Railroad Company caused to be surveyed the line of definite location of that portion of its line of railroad and telegraph line extending from Kalama, in the then Territory of Washington, to Portland, in the then State of Oregon, and

on the 22d day of September, 1882, caused a plat thereof, approved by the Secretary of the Interior, to be filed in the office of the Commissioner of the General Land Office; that a copy of said map is hereunto annexed, marked Exhibit ——, and made a part hereof.

That upon the filing of said map the Commissioner of the General Land Office, acting under the direction of the Secretary of the Interior, caused to be prepared a diagram showing the lands situate within the 20 and 30 mile limits on each side and coterminous with said line of definite location, and on the 30th day of January, 1888, transmitted said diagram to the United States District Land Officers at Vancouver, Washington, together with a letter in words and figures as follows, to wit:

Department of the Interior,
General Land Office.
Washington, D. C., January 30, 1888.

Register and Receiver, Vancouver, Washington Territory.

Gentlemen: This office is in receipt of your letter of the 14th instant, and in answer thereto I have to advise you that the map of the definite location of the line of the Northern Pacific Railroad from Portland, Oregon, to Kalama, Washington Territory, was filed in this office September 22, 1882. I enclose you herewith a diagram showing the limits of the grant to said company as adjusted to the line of definite location so far as the lands fall within your district.

The lands are in no way affected by the filing of this diagram, the same having been withdrawn in 1870 upon the line of general route along the Columbia River.

A diagram showing the limits of the grant from Kalama northward in your district, as adjusted to the line of definite location, was sent to your office January 21, 1874.

Please acknowledge receipt of the enclosed diagram.

Very respectfully,

S. M. STOCKLAGER,

Acting Commissioner.

That a copy of said diagram, and a letter in words and figures the same as said letter so transmitted to said District Land Officers at Vancouver, were in like manner transmitted to the United States District Land Officers at Olympia, Washington.

That a copy of said diagram so prepared by the Commissioner of the General Land Office and so transmitted to said District Land Officers at Vancouver, is hereunto annexed, marked Exhibit ——, and made a part hereof.

XIII.

That by act of Congress approved September 29, 1890, entitled "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," it was provided by section 1 of said act:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction

or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain: Provided, that this act shall not be construed as forfeiting the right of way or station grounds of any railroad company heretofore granted. (26 Stat., 496.)

It was further provided by section 6 of said act as *follows:*

Sec. 6. That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation, or person to lands which were excepted from such grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure by virtue of the forfeiture hereby declared, to the benefit of the completed line. (26 Stat., 496, 498.)

XIV.

That following the passage of the said act of September 29, 1890, the Secretary of the Interior, on December 24, 1890 (11 L. D. 625), issued the following instructions under the said act:

By letter of October 28, 1890, you submitted for my approval a draft of a circular letter of instructions under the forfeiture act of September 29, 1890. (26 Stat., 496.)

Section 1 declares a general forfeiture of granted lands

opposite to the unconstructed portions of land-grant railroads.

Section 2 of said act provides:

"That all persons who, at the date of the passage of this act, are actual settlers in good faith on any of the lands hereby forfeited and are otherwise qualified, on making due claim on said lands under the homestead law within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act, and shall be regarded as such actual settlers from the date of actual settlement or occupation; and any person who has not heretofore had the benefit of the homestead or pre-emption law, or who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws, may make a second homestead entry under the provisions of this act."

You state that a strict construction of this language would exclude from the privilege of a second homestead entry granted by this section, any person who had perfected title to land under either the homestead or pre-emption law, and would confer the privilege only upon those who had made an entry under either law, and failed from any cause to perfect title to the same, but that this construction is repugnant to the idea of a second homestead entry, "for unless the settler had heretofore made a homestead entry, the necessity for the privilege of a second homestead entry does not arise." You then express the belief that "the intention of this act is to permit a second entry where the party has not heretofore

perfected title under both homestead and pre-emption laws, thus to permit him to acquire, in the aggregate, three hundred and twenty acres under both of said laws."

It is clear that the first clause of the section allows the actual settler, if qualified, to make a homestead entry of the tract upon which he had made settlement, and this as a preference right to be exercised within six months after the passage of the act. While the language of the second clause is somewhat ambiguous, I have concluded that the language authorizing "a second homestead entry" refers only to those persons who had theretofore made a homestead entry but failed from any cause to perfect the same. The object is to allow any one qualified who had not theretofore secured a piece of land under the homestead law to obtain a tract of these forfeited lands under that law, and at the same time to take these lands out of the operation of the pre-emption law.

I suggest that the circular instructions under the third section of the act be in the words of the act itself, with the addition of the instructions now in the circular as to the provisos to said section.

By the first section of the act the grant to the Northern Pacific Railroad Company appertaining to the main line between Wallula, Washington, and Portland, Oregon, is forfeited.

This renders it necessary to establish terminals separating the granted lands from those forfeited, at these points.

On August 13, 1885, the question of fixing the terminal limit at Wallula was considered by the Department (5 L. D., 459), and it was held that the line should be run

at right angles to the general course of the last section (of twenty-five miles) of the road.

By the fourth section of the grant for said company it is enacted:

"That whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed, in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States; and patents of land as aforesaid shall be issued to said company, confirming to said company the right and title of said lands, situate opposite and coterminous with said completed section of said road. . . . . And so, from time to time, whenever twenty-five additional consecutive miles shall have been constructed. (13 Stats., 369.)"

Referring to these provisions the Secretary in his decision of 1885 said:

"From these provisions as the railroad company completed each consecutive twenty-five miles of road, upon report of the commissioners, the grant must be confirmed by patents for the land on each side of the road corresponding with the section of the road completed. If it is to be confirmed by patent, as each twenty-five miles is constructed, a determination of boundary must precede the patent, the presumption would arise that

either at or before the time the inspection was made, the law contemplated that the terminal limit of the twenty-five miles inspected was to be fixed. By the provisions of the grant, such inspection would fix the terminal limit of land to be patented and thus, for purposes of patenting, the road as constructed, would be divided in patenting sections of twenty-five miles each, the boundary of each of such sections fixed at or before the time of inspection.

"The grant then having divided the road into sections of twenty-five miles for purposes of boundary and patenting, in fixing the boundary of this last section by the provisions of the grant alone (excluding all extraneous facts), as the courses of the road are various, some general course must be adopted from which to fix the terminal line.

"The subject of the course to be fixed was considered in a decision rendered by Secretary Thompson, on the 23d of February, 1858, reported in first lester, page 527, also in the case of the Flint and Pere Marquette Railroad, by Secretary Kirkwood, on September 1, 1881 (1 L. D. 394); and also was incidentally discussed by the Supreme Court of the United States in the case of the United States vs. Burlington and Missouri River Railroad (8 Otto, 334). The substance of the rulings in the several cases is: 'The land is taken along such line in the sense of the statute, when taken along the general direction or course of the said road within lines perpendicular to it at each end.'

"Then if this rule is to be applied (as it has been already shown, only the last twenty-five miles of the road

under the terms of the present grant can be considered), the terminal line should be run at right angles to the general course of the last twenty-five miles of the road."

Under this decision it is clear that the Department held the company to be entitled to patents for the road then constructed, down to the line so established and no further. Assuming this conclusion to be correct (and the forfeiture act in no way interferes with it), there is no reason now presented for changing the same. On the contrary the terms of the forfeiture act are in line with that decision. Said section four of the granting act, supra, directed patents to issue for lands "opposite to and co-terminous with said completed section of said road; . . . . and so on as fast as every twenty-five miles of said road is completed as aforesaid": the first section of the forfeiture act restores to the United States the title to "all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed." If the line fixed in 1885 separated the lands then earned by the company, by the construction of the road, from those not so earned, it does so now, as no more road has since been built. In other words that line divides the lands "opposite to and coterminous with" the portion not constructed, from those earned by the constructed road. The line of 1885, will, therefore, be adhered to.

The same principles apply to the line at Portland.

Section 6 of the act provides:

"Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line

appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure by virtue of the forfeiture hereby declared to the benefit of the completed line."

You state that "the grant appertaining to the main line of the Northern Pacific Railroad, forfeited by this act, is overlapped by the limits adjusted upon the constructed branch line of said road, and as to such overlap the grant is of a moiety on account of each line"; that the map of general route of the main line opposite said conflict was filed and a legislative withdrawal made thereon prior to the location of the branch line and that the withdrawal continued in force at the date of the passage of the forfeiture act. You conclude that within the conflict "every alternate odd-numbered section" should be reserved for the branch line, and the remaining odd sections restored to the public domain under said section 6, and suggest that the company be called upon to elect which of such alternate odd-numbered sections it will take in satisfaction of the moiety for its branch line. All of this meets with my approval.

The company urges that as the main line had not been definitely located, between Wallula and Portland, the lands within the withdrawal on general route for that distance cannot be treated as granted lands, and are therefore not subject to said provisions as to moiety lands within the overlapping limits.

This contention cannot be sustained. In the first place there was a grant along said route, which lacked only action on the part of the company to consummate.

Furthermore, a reading of the entire act leaves no room to doubt that a forfeiture along said stretch of the main line was contemplated, and the lands so forfeited are described in the first section of the act as "granted" lands. If this be not true, there has been no forfeiture at all on that part of the line, a conclusion which even the company does not maintain. It is equally apparent that the word "granted" in said section 6, is used in the same sense as in section one, and, therefore, refers to the lands upon which the forfeiture operates. These are the lands withdrawn along said line.

You will, accordingly, notify the company to indicate within thirty days from notice what alternate odd-numbered sections it will elect to take. If the company elect to take sections 1, 5, 9, 13, etc., of the various townships then sections 3, 7, 11, 15, etc., will remain to the Government and be restored to the public domain or vice versa. Should the company fail to make its election within said time then your office will act in that capacity in its stead.

Section 7 provides that upon certain conditions the forfeiture shall not operate for one year as to so much of the grant for the Gulf and Ship Island Railroad as lies south of a line drawn east and west through the point where said road may cross the New Orleans and Northeastern Railroad in the State of Mississippi. It appears from inquiries made by your office that the former road will not cross the latter at the point indicated by the map of definite location. You accordingly request instructions "as to where the terminal shall be established in order to separate the lands upon which

the act operates immediately from those saved from forfeiture for one year." I suggest that you direct said company to notify you, within thirty days, of the exact point at which the line will cross the New Orleans road.

After the submission of said circular, by letter of November 7, 1890, you submitted an opinion in reference to the operation of section 8 of said act upon the grant for the Mobile and Girard Railroad in Alabama. Inasmuch as the questions therein involved are peculiar, I suggest that the instructions under said section be omitted from the circular and I will communicate with you later on the subject.

You state that section 4 of the act repeals certain sections in acts making grants to aid in the construction of certain railroads in so far as said sections require the Secretary of the Interior to reserve lands within the indemnity limits of such grants, and recommend the formal restoration of any such lands now remaining withdrawn.

On August 13, and 15, 1887, the lands within indemnity limits of most of the land grant, roads were restored to the public domain (6 L. D. 84 and 92). Certain exceptions, however, were made of roads to which you now refer. (See 6 L. D. 328 and 456.) To the end suggested by you, you will notify each of said companies to show cause within thirty days why the withdrawal of indemnity lands made for its benefit, should not now be revoked and the lands therein embraced restored to settlement. This practice is in accord with that in the former restoration.

Otherwise than as herein indicated the proposed circular will meet my approval. Herewith are returned the papers.

XV.

That thereafter, in further construing the said forfeiture Act of Congress of September 29, 1890, the Secretary of the Interior, on July 18, 1895, in the case of John T. Spaulding vs. Northern Pacific Railroad Company (21 L. D. 57), involving land similarly situated to these here in controversy, rendered the following decision:

I have considered the appeal by John T. Spaulding from your office decision of May 21, 1892, denying his application to purchase under the third section of the act of September 29, 1890 (26 Stat. 496), the E½ of the NE. ¼ and N. ½ of SE. ¼ Sec. 5, T. 4 N., R. 2 E., Vancouver land district, Washington.

The act of September 29, 1890, supra, forfeited the lands opposite and coterminous with the unconstructed portion of any railroad to aid in the construction of which a grant had previously been made, and the basis of appellant's claim is that this land was forbidden by that act, and was therefore, subject to his application under the third section.

Your office decision holds that the lands falling within the primary limits of the grant upon the definite location shown upon the map filed September 22, 1882, are not affected by the act of forfeiture and Spaulding's application is therefore denied.

This land is in the neighborhood of Portland, Oregon, and would be east of a terminal line drawn at right an-

gles to the last twenty-five miles of road, as shown upon the map of general route east of Portland. It is also within the primary limits of the grant appertaining to the road, as located and constructed north of Portland or between Portland and Tacoma.

In the case of the United States vs. Northern Pacific Railroad Company (152 U. S. 284), the Court holds that the grant for the portion of the road between Portland and Puget Sound was made by the joint resolution of May 31, 1870 (16 Stat. 378), and that the company did not take by relation as of the act of July 2, 1864, (13 Stat. 365), for this portion of its road.

Under the act of July 2, 1864, a grant was made to the Northern Pacific Railroad Company for a road via the valley of the Columbia River to a point at or near Portland, so that it must be clear that in the neighborhood of Portland the company has two grants: that via the valley of Columbia River east of Portland, being under the act of July 2, 1864, and the grant north of Portland to Puget Sound, being under the resolution of May 31, 1870.

Prior to the passage of the resolution of 1870, no location had ever been made of the grant under the act of 1864, so that when filing its map of general route on August 13, 1870, a continuous line was shown via the valley of the Columbia River extending northward to Puget Sound. The limits adjusted thereon were continuous limits and upon the maps of location of that portion of the road extending north of Portland, which was constructed, the limits were adjusted without regard to any conflict with the grant east of Portland. The line

of road east of Portland via the valley of the Columbia River, was not constructed past Wallula, Washington, so that the portion of the road between Wallula and Portland, being unconstructed, the grant appertaining thereto was forfeited by the act of September 29, 1890, supra.

It appears that following the passage of the act of September 29, 1890, to wit, on October 28, 1890, your office submitted for approval a draft of a circular letter of instructions under that act and therein the question as to the proper terminal separating the forfeited lands from those not forfeited at Wallula and Portland, was submitted for consideration.

This matter was considered in departmental letter of December 24, 1890 (11 L. D. 625), in which it was held, after referring to departmental decision of August 13, 1885 (5 L. D. 459), that—

"Under this decision it is clear that the Department held the company to be entitled to patents for the road then constructed, down to the line so established, and no further. Assuming this conclusion to be correct (and the forfeiture act in no way interferes with it) there is no reason now presented for changing the same. On the contrary the terms of the forfeiture act are in line with that decision. Said section four of the granting act, supra, directed patents to issue for lands 'opposite to and coterminous with said completed section of said road; . . . . and so on as fast as every twenty-five miles of said road is completed as aforesaid'; the first section of the forfeiture act restores to the United States the

title to 'all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed.' If the line fixed in 1885 separated the lands then earned by the company, by the construction of the road, from those not so earned, it does so now, as no more road has since been built. In other words the line divides the lands 'opposite to and coterminous with' the portion not constructed, from those earned by the constructed road. The line of 1885, will, therefore, be adhered to. The same principles apply to the line at Portland."

This has since been considered as the decision of this Department, and all lands within the limits of the grant adjusted to the line of location of the road north of Portland, have been held to have been saved from forfeiture and not subject to the provisions of the act of September 29, 1890.

The case in hand, however, for the first time presents this question for determination by the Department, and the instructions previously given cannot be considered as an adjudication of the question. From what has been said it must be clear that there are two grants, under which this company claims, in the neighborhood of Portland; that east of Portland being under the act of 1864, while that running north of Portland is under the resolution of 1870. The grant for that portion of the road in the neighborhood, and east of, Portland, was forfeited by the act of September 29, 1890. As provided in the act of forfeiture, none of the lands forfeited inure by reason of such forfeiture to any other grant. So far,

therefore, as the limits of the grant for the portion of the road via the valley of Columbia River and east of Portland, overlaps the subsequent grant for the portion of the road north of Portland, the latter grant must, to that extent, fail, and it must be held that such lands are subject to the operation of the act of September 29, 1890.

In the departmental decision of August 13, 1885 (referred to in the instructions of December 24, 1890), the terminal under consideration was one occurring in the adjustment of the limits to a portion of the road in process of construction, the grant for which was made by the act of July 2, 1864, and it was therein correctly held that the terminal established upon the constructed road properly separated the lands earned from those forfeited, so far as that grant was concerned.

The question presented at Portland, however, was not similar to that discussed in the decision of August 13, 1885. Portland was the end of one grant and the beginning of another; these two approached each other at nearly right angles, so that, of necessity, the two grants in the neighborhood of Portland overlapped. The prior grant having been forfeited, the lands appertaining thereto were restored to the public domain, and the establishment of the terminal upon the construction of the road from Portland northward, could in no wise be considered as a terminal for separating the lands forfeited from those not forfeited, upon the other line for which another grant, of a different date, was claimed by the company.

The instructions of December 24, 1890, are hereby recalled and vacated in so far as they hold that the ter-

minal established upon the constructed road north of Portland correctly separates the lands in that vicinity (which were earned by the construction of the road aforesaid) from the land forfeited and appertaining to the road east of Portland. In the adjustment of this grant, therefore, it must be held, as before stated, that all lands within the limits of the grant adjusted to the line east of Portland, are forfeited and restored by the act of September 29, 1890, without regard to the limits of the adjustment upon the road north of Portland.

As your office decision denied Spaulding's application upon the ground that the same fell within the limits adjusted to the located road north of Portland, I must reverse your office decision and said application will be accepted, unless, upon further examination, other good and sufficient reasons appear for the rejection of the same.

XVI.

That thereafter in pursuance of the foregoing decisions the Department of the Interior caused to be prepared a diagram showing the terminal line to the portion of the grant via the valley of the Columbia River to a point at or near Portland as defined by said decisions, and said diagram was by the Commissioner of the General Land Office transmitted to the local United States officers at Vancouver, Washington, with a letter from the Commissioner of the General Land Office dated January 26th, 1896, in words and figures as follows, to wit:

Department of the Interior,
General Land Office,
Washington, D. C., January 22, 1896.

Register and Receiver, Vancouver, Washington.

Sirs: I enclose herewith instructions, approved by the Secretary of the Interior, January 13, 1896, for the restoration to entry of the lands within your district, which are affected by the ruling of the Department of July 18, 1895, in the case of Spaulding vs. Northern Pacific R. R. Co. (21 L. D. 57), affirmed on review October 18, 1895, wherein it was held that there are two grants to the Northern Pacific Railroad Company, the first by the act of July 2, 1864, and the second by the joint resolution of May 31, 1870, in the neighborhood of Portland, Oregon, and that so far as the limits of the grant of 1864 overlapped the subsequent grant of 1870, the latter must fail; that the forfeiture by the act of September 29, 1890, of the former, included the land within the overlap, and that they are subject to disposal thereunder.

Said instructions are accompanied by a diagram showing within the colored lines marked "20 miles limit, act of 1870"; "40 miles limit act of 1870"; "40 miles limit, act of 1864"; and "Western terminal of forfeiture act of September 29, 1890," the area affected by the Spaulding decision.

You will without delay take the steps indicated therein for opening the lands to disposal, and report promptly your action in the matter.

Very respectfully,
S. W. LAMOREUX,
Commissioner.

That a copy of said diagram so transmitted to the district officers at Vancouver is hereunto attached and marked Exhibit ——— and made a part hereof.

XVII.

That thereafter, upon consideration of a certain petition filed on behalf of settlers praying for a change in the terminal as aforesaid defined to the unconstructed portion of the Northern Pacific Railroad via the valley of the Columbia River to a point at or near Portland, the Secretary of the Interior, on July 9, 1896, (23 L. D. 71), rendered an opinion in words and figures as follows, to wit:

With your office letter of March 26, 1896, was transmitted a petition filed on behalf of certain settlers praying for a change in the terminal established to the unconstructed portion of the Northern Pacific Railroad via the valley of the Columbia River, to a point at or near Portland.

To a proper understanding of the question a brief recitation of the legislation and previous action taken by this department in relation to the grant is necessary.

The act of July 2, 1864, (13 Stat. 365), incorporating the Northern Pacific R. R. Co. made a grant to aid in the construction of a continuous line of railroad—

"Beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget Sound, with a branch via the valley of the Colum-

bia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus.

By the joint resolution of April 10, 1869 (16 Stat., 57), said company was "authorized to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound, to be determined by said company, and also to connect the same with its main line west of the Cascade Moutains in the Territory of Washington."

By the joint resolution of May 31, 1870 (16 Stat. 378), said company was authorized—

"To locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound."

In the case of Spaulding v. Northern Pacific R. R. Co. (21 L. D., 57), it was held that—

"At Portland, Oregon, the Northern Pacific has two grants, the first for the line eastward, under the act of 1864, and the second northward under the joint resolution of 1870, and so far as the limits of the grant east of said city overlaps the subsequent grant, the latter must fail; and as the road at such point eastward is unconstructed and the grant therefor forfeited by the act of September 29, 1890, the lands so released from said grant, do not inure to the later grant, but are subject to

disposal under the provisions of said forfeiture act. (Syllabus.)"

After this decision it became necessary to establish a terminal separating the grants in the neighborhood of Portland, and the diagram submitted showed the location of the terminal to be at a point selected on the line of general route to the north of the Columbia River, which point your office denominated as Vancouver, Washington.

The petition urges that the point selected is about two miles east of the actual location of Vancouver, and in reporting on said petition your office letter states:

"In submitting this matter, I have to say that the diagram prepared by this office nearly twenty-six years ago, to show the limits of the withdrawal which took effect upon the filing by the railroad company of the map of the general route of its road from Puget Sound, by way of the valley of the Columbia River, to the mouth of the Walla Walla River, was prepared from said map, and the line of the road on the diagram corresponds with that on the map of location as nearly as it is possible to make it, the roughness and crudity of said map being considered.

"The claim that Vancouver is two miles west of the place fixed on the diagram, if true, is not material, the spot on the line of the road fixed as the most westerly point nearest to Portland being taken as the end of the location under the act of 1864, and the diagram showing Vancouver at that point it was so stated in the letters treating of the matter. It was the most westerly point on the line of the located road nearest Portland that was

sought and fixed upon, and it matters not whether this point is at Vancouver or elsewhere. The line of the road where it touches Vancouver according to the copy of the township filed and marked exhibit B, is not such point. The location map of the company and the map of the State prepared by this office both show Vancouver east of its actual location, but as before stated, this is not material.

"An examination of the map of location shows that line of the road as a continued line along the north bank of the Columbia, with a spur to Portland, from a point near Vancouver and east thereof, which as before stated is practically the same as fixed in the preparation of the diagram of the grant.

"No reference is made to the spur to Portland either on the map itself or the letter transmitting it to this office, nor has mention of it been made until now, in any manner. It is not shown on the withdrawal diagram, and no attention was paid to it in the construction of said diagram. No withdrawal on account of it was ever made, although the first withdrawal on account of this portion of the road was of twenty miles only and did not cover all lands within twenty miles of the spur.

"To sum up the facts in relation to this matter, the line of the road was laid down on the diagram of withdrawal as nearly as possible in conformity with that shown on the map of location, this diagram has governed the action of this office in the administration of the company's grant for nearly twenty-six years, and ever since the earliest action affecting said grant was taken; the point fixed for the western terminal of the forfeiture is

the most westerly point on the located line of the road, nearest Portland, Oregon, for which any withdrawal was made, and said terminal as shown is as nearly correct as it is possible to get it."

From the previous recitation it is apparent that Congress first provided for a main line to Puget Sound with a branch via the valley of the Columbia River, to a point at or near Portland.

Under the resolution of 1869, said company was authorized to extend its branch line from a point at or near Portland to Puget Sound, but without a land grant.

The joint resolution of 1870, changed the branch to main line, the company being authorized "to locate . . . . its main road to some point on Puget Sound via the valley of the Columbia River," etc.

This same resolution provides—

"And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by January 1, 1872, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points."

In referring to this resolution, the Supreme Court in the case of United States vs. Northern Pacific R. R. Co. (152 U. S. 294), said:

"Undoubtedly, this resolution gave authority to locate and construct a main road via the Columbia River Valley to Puget Sound. A road so located and constructed would, or might, have passed the city of Portland. But if, as the company now insists, the act of 1864 gave ample authority to locate and construct a road extending

from Lake Superior to Puget Sound, along the valley of the Columbia River, and by the way of Portland or its vicinity, the resolution of 1870 was entirely unnecessary in so far as it gave authority to the company to locate and construct its road through the Columbia River Valley to some point on Puget Sound. We cannot agree that this resolution is to be held, in this respect, as simply a recognition by Congress of an existing right, in the company, to locate and construct a road from Portland to Puget Sound, with the right to obtain lands, in aid thereof, as provided in the act of 1864. On the contrary, it should be regarded as giving a subsidy of lands in aid of the construction of a new road, not before contemplated, that would directly connect Portland and its vicinity with Puget Sound."

This would seem to make it clear that the point of connection between the branch line originally provided for, which was to end at a point "at or near Portland," and the extension to Puget Sound, which under the resolution of 1870 became a continuous line was, by the joint resolution of 1870, made at Portland, Oregon, instead of "at or near Portland." The map filed in 1870 shows a continuous line to the north of the Columbia River with a line dropped from a point nearly due north of Portland to Portland, a distance of about seven miles.

In the building of the road from the western terminus at Tacoma the company built directly to the city of Portland.

It will thus be seen that the resolution of 1870 designated the city of Portland, the company's map of location made connection with that city and in the building

of the road southward from Tacoma, the company built direct to Portland, so that had the company proceeded with the construction under its charter it would necessarily have been obliged to built eastward from Portland.

In this connection I have to call attention to the fact that in considering the question of the conflict between the grant made by the act of 1864 for the Northern Pacific R. R. Company, and the Oregon and California R. R. Co., under the act of July 25, 1866 (14 Stat., 239), Portland was accepted as the western terminus of the branch line of the Northern Pacific railroad provided for under the act of 1864, at which point the terminal was drawn. Upon the basis of this terminal suit has been begun against the Oregon and California railroad company, in which judgment below has been given against the company.

For the reasons given I am of opinion that the terminal to the portion of the line via the valley of the Columbia River should be drawn through Portland, Oregon, thus forming a continuation of the terminal heretofore established at that point.

Under date of May 20, 1896, you transmitted the papers relative to a demand made upon the Northern Pacific Railroad Company for the reconveyance of certain lands erroneously patented to the east of the terminal heretofore established by your office, from which it appears that the resident counsel for the company, Messrs. Britton and Gray, have refused to accede to the demand.

These papers are returned to the end that the demand

may be amended to agree with the change in the terminal herein directed to be made.

XVIII.

That thereafter the Commissioner of the General Land Office prepared a diagram showing the designation of the terminal line contemplated by the decision of the Secretary of the Interior, set out in the preceding paragraph of this stipulation, and transmitted said diagram to the local officers at Vancouver, Washington, on August 20, 1896, with a letter in words and figures as follows, to wit:

Department of the Interior,

General Land Office,

Washington, D. C., August 20, 1896.

Register and Receiver, Vancouver, Wash.

Sirs: On January 13, 1896, instructions were given your office for the restoration of the lands within your district which were affected by the ruling of the Department of July 18, 1895, in the case of Spaulding vs. Northern Pacific R. R. Co. (21 L. D. 57), where it was held that there are two grants to the Northern Pacific Railroad Company, the first by the act of July 2, 1864, and the second by the joint resolution of May 31, 1870, in the neighborhood of Portland, Oregon, and that so far as the limits of the grant of 1864 overlapped the subsequent grant of 1870 the latter must fail; that the forfeiture of the act of September 29, 1890, of the former included the lands within the overlap, and that they are subject to disposal thereunder.

On July 9, 1896, the Department amended the ruling

in Spaulding vs. N. P. R. R. Co., supra, by directing that the western terminal to the forfeited portion of the company's line via Columbia River be drawn through Portland, Oregon, thus forming a continuation of the terminal heretofore established at that point showing the conflict between the grant by the act of 1864 to the Northern Pacific Company and the Oregon and California Railroad Company by the act of July 25, 1866.

It is the duty of this office therefore to dispose of the additional lands coming within the overlap under said Spaulding ruling as amended. I have accordingly prepared and herewith enclose a diagram showing within the colored lines marked "Western terminal of forfeiture act of September 29, 1890," and "Final Western terminal of forfeiture act of September 29, 1890," the additional area affected by the said ruling as amended.

To the end that all persons interested may have opportunity to present any claims they may have to any of these additional lands, you will cause to be published for a period of thirty days, in some newspaper of general circulation in their vicinity, a notice that said lands were declared forfeited by the act of September 29, 1890, and restored to the public domain, and are subject to disposal by your office, and that in order to protect their rights all claimants under said forfeiture act of 1890, and the act of March 1, 1887, should come forward and assert their claims.

The receiver, as disbursing officer, will pay the cost of

publication and forward a copy of the notice, with proof of publication as his voucher for disbursement.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:
HOKE SMITH,
Secretary.

That a copy of said map or diagram so prepared by the Commissioner of the General Land Office and transmitted to the District Land Officers at Vancouver, is hereunto annexed, marked Exhibit ———, and made a part hereof.

XIX.

That a portion of the lands described in the bill of complaint herein are situated opposite to and coterminous with the line of definite location of that portion of said Northern Pacific Railroad extending from Kalama to Tenino, in the Territory (now State) of Washington, and within the prescribed limits of the grant of lands in place.

That the remaining lands described in said bill of complaint herein are situated opposite to and coterminous with the line of definite location of that portion of said Northern Pacific Railroad extending from Kalama, in the Territory (now State) of Washington, to Portland, in the State of Oregon, and are within the prescribed limits of the grant of lands in place.

That all of the lands described in the bill of complaint are situate opposite to and within forty miles of that portion of the lines delineated upon said maps of 1865

and 1870 extending down the valley of the Columbia River to a point at or near Portland in the State of Oregon; and all of said lands are likewise situate opposite to and within forty miles of that portion of the lines delineated upon said maps extending northward from a point at or near Portland to Puget Sound.

XX.

That all of the lands described in the bill of complaint herein were, on May 31, 1870, as well as on the dates of the filing of the maps of definite location by said Northern Pacific Railroad Company opposite thereto, to wit, on September 15, 1873, and September 22, 1882, public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, except so far as said lands were reserved or appropriated by reason of the grant made by the act of July 2, 1864, to aid in the construction of that portion of said Northern Pacific Railroad via the valley of the Columbia River to a point at or near Portland, and the maps filed and acts of the company performed in pursuance thereof.

XXI.

That prior to the year 1875, the Northern Pacific Railroad Company completed the construction of that portion of its road extending from Kalama to Tacoma, upon the line of definite location thereof; and thereupon the President of the United States appointed commissioners to examine that portion of said road, and said commissioners duly reported that the same had been constructed in a good, substantial and workmanlike manner, in all

respects as required by the act making the grant; and thereupon, to wit, on the first day of January, 1875, the President of the United States approved the report of said commissioners and accepted said portion of said road, as required by the act making the grant.

That thereafter said Northern Pacific Railroad Company completed the construction of that portion of said road extending from Kalama, in the then Territory of Washington, to the city of Portland, in the State of Oregon; that said portion of said road was constructed upon said line of definite location; and thereupon the President of the United States appointed commissioners to examine said portion of said road, and said commissioners duly reported that the same had been constructed in a good, substantial and workmanlike manner, in all respects, as required by the act making the grant; and thereupon, and on October 5, 1883, the President of the United States duly approved the report of said commissioners and accepted said portion of said road, as required by the act making the grant.

XXII.

That no portion of the said Northern Pacific Railroad and telegraph line via the valley of the Columbia river to a point at or near Portland, has ever been constructed by the said Northern Pacific Railroad Company.

XXIII.

That on or about the 23d and 27th days of May, 1895, the United States issued and delivered to the Northern Pacific Railroad Company letters patent, in due form of law, conveying to said Northern Pacific Railroad Com-

pany the legal title to all the lands described in the bill of complaint and involved in this suit.

XXIV.

That the Northern Pacific Railway Company is a corporation organized, created and existing under and by virtue of the laws of the State of Wisconsin.

XXV.

That the decree of the Circuit Court of the United State for the Eastern District of Wisconsin, and of the Circuit Court of the United States for the District of Washington, alleged in the bill and admitted in the answer thereto, was rendered in a suit of equity, instituted by the Farmer's Loan and Trust Company, for the purpose of foreclosing three certain mortgages, executed and delivered by the said Northern Pacific Railroad Company, upon certain property of said company, including the lands described in the bill of complaint, under said decree, and by virtue of certain deeds of conveyance, executed in pursuance of said decree, the Northern Pacific Railway Company acquired all the interest of the Northern Pacific Railroad Company in and to those lands described in the bill of complaint, which, at the date of said sale, were undisposed of by said Northern Pacific Railroad Company, by virtue of sales, contracts and deeds as hereinafter set forth.

XXVI.

That the allegations contained in paragraph three of the answer herein, as amended, relating to the sale of

the lands described in schedules "A," "B," and "C," annexed to said answer, are true.

JOHN W. GRIGGS,
Attorney General of the United States.

WILSON R. GAY,
United States Attorney, Solicitors for Complainant.

JAMES B. KERR,
H. M. STEPHENS,
Solicitors for Defendants.

Rescinded as to Par. 26, by stipulation filed Dec. 20, 1900.

J. B. K.
W. R. GAY.

O. K.
GAY,
U. S. Att'y.
KERR,
For Defendants.

[Endorsed]: Filed in the United States Circuit Court. May 12, 1900. A. Reeves Ayres, Clerk. By Sam'l D. Bridges, Deputy.

And afterwards, to wit, on the 20th day of December, 1900, there was duly filed in said court in said cause a replication, in the words and figures following, to wit:

In the Circuit Court of the United States, for the District of Washington, Western Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY (a Corporation), and NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendants. } No. 551.

Replication.

The replication of the United States of America, plaintiff, to the joint and several answer of the Northern Pacific Railroad Company and the Northern Pacific Railway Company to bill of complaint.

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefits and advantages of exception, which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the said joint and several answer of the Northern Pacific Railroad Company and the Northern Pacific Railway Company, and for replication thereunto, says: That it will aver, maintain, and prove its said bill of complaint

to be true, certain, and sufficient in the law to be answered unto; and that said joint and several answer of the Northern Pacific Railroad Company and Northern Pacific Railway Company is very uncertain, evasive and insufficient in law to be replied unto by repliant without that, that any other matter or thing whatsoever, in the said joint and several answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by its said bill of complaint it hath already prayed.

WILSON R. GAY,
United States Attorney.

Received copy hereof, Dec. 19, 1900.

JAMES B. KERR,
for Defendants.

Due and full service of within replication acknowledged this 19th day of December, 1900.

As to time of service and filing waived.

JAMES B. KERR,
Attorney for Defendants.

[Endorsed]: Filed in the United States Circuit Court, District of Washington. Dec. 20, 1900. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

And afterwards, to wit, on the 20th day of December, 1900, there was duly filed in said court in said cause a stipulation, in the words and figures following, to wit:

In the Circuit Court of the United States, for the District of Washington, Western Division.

IN EQUITY.

UNITED STATES OF AMERICA, Complainant,
vs.
NORTHERN PACIFIC RAILROAD COMPANY and NORTHERN PACIFIC RAILWAY COMPANY, Defendants. } No. 551.

Stipulation as to Laws and Facts.

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that that portion of a certain stipulation of facts filed herein on the 12th day of May, in the year 1900, namely, paragraph twenty-six of said stipulation which reads as follows: "That the allegations contained in paragraph three of the answer herein as amended relative to the sale of lands described in Schedules "A," "B," and "C" and annexed to the answer are true," be, and the same is hereby rescinded and held for naught.

It is further stipulated that for the purposes of the

trial of this cause that the following facts shall be taken to be true:

That some of the persons named in the schedules attached to the answer herein, purchased those certain lands, the descriptions whereof are set opposite their respective names, from the Northern Pacific Railroad Company, or the receivers thereof, for a valuable consideration and in the belief that said lands were part of the grant to said railroad company, and that some other of said persons named in said schedules entered into contracts with said railroad company, or its receivers, for the purchase of those lands, descriptions whereof are set opposite their respective names, but at the same time insisted that said lands were excepted from said grant and certain of said persons last named had made, at the said time said contracts were entered into and prior thereto, applications to enter said lands under the homestead law which were still pending at the date of the execution of said several contracts, and it is agreed that if a decree shall be directed herein awarding relief to the complainant, a reference shall be ordered for the purpose of determining what patents, if any, covering said lands, if any, should be confirmed under the provisions of that act of Congress approved March 3, 1887, entitled, "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," and that act of Congress approved March 2, 1896, entitled, "An act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes," and

upon such reference the status of said purchasers and the lands held by them shall be ascertained under the directions of the Court and report thereof made to the Court.

January 20, 1900.

JOHN W. GRIGGS,
Attorney General.
By W. R. GAY,
United States Attorney.
WILSON R. GAY,
Counsel for Complainant.
JAMES B. KERR,
Counsel for Defendants.

[Endorsed]: Filed in the United States Circuit Court, District of Washington. December 20, 1900. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

And afterwards, to wit, on the 20th day of December, 1900, there was duly filed in said court in said cause an order, in the words and figures following, to wit:

In the United States Circuit Court, for the District of Washington, Western Division.

UNITED STATES OF AMERICA, Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY et al., Defendants.

No. 551.

Order Allowing Replication.

In the above cause, plaintiff this day files replication to defendants' answer, as amended, with the full acknowledgment of service by counsel for defendants and a waiver as to time, and this Court being fully advised, does direct that the said replication may be deemed as filed within the time prescribed by the rules of this Court, on the hearing.

Done in open Court this 20th day of December, 1900.

C. H. HANFORD,
Judge.

O. K.
J. B. K.

[Endorsed]: Filed in the United States Circuit Court, District of Washington. December 20, 1900. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

And afterwards, to wit, on the 18th day of July, 1901, there was duly filed in said court in said cause a memorandum of decision, in the words and figures following, to wit:

In the Circuit Court of the United States, District of Washington, Western Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY (a Corporation), and NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),
Defendants.

Memorandum of Decision on the Merits.

(Filed July ——, 1901.)

This suit was instituted by the Attorney General to cancel patents for a large number of tracts of land within odd numbered sections on both sides of that part of the Northern Pacific Railroad which extends from Tacoma to Portland, and it has been argued and submitted upon the pleadings and an agreed statement of facts. Construction of this section of the Northern Pacific Railroad was authorized, and a grant of lands to aid the same was given by the joint resolution of Congress passed May 31, 1870. The original charter of the Northern Pacific Railroad Company contained in the act of Congress of July 2, 1864, authorized the construction of a branch line of the Northern Pacific Railroad through the valley

of the Columbia River to Portland, Oregon, and granted lands to aid in the construction thereof. The line of road from Tacoma to Portland as constructed, is nearly at right angles with the contemplated line down the Columbia River to Portland, so that the land grant contained in the joint resolution of May 31, 1870, overlaps that part of the grant contained in the original charter situated within the square bounded by the two lines leading into Portland, and the eastern boundary line of the grant made by the joint resolution and the northern boundary line of the grant for the branch line via the Columbia River valley. The branch line was not constructed west of Wallula, and by an act of Congress all of the grant appertaining to the uncompleted part of the road was forfeited to the United States. The lands involved in this suit, were patented to the railroad company as part of the grant earned by the construction and completion of the road into Portland from Puget Sound and the present contention of the Government is that, said lands were forfeited because within the boundaries of the grant which would have been earned by completion of the road from Wallula to Portland. In the argument, counsel for the Government have rested their case upon the theory that these lands were so disposed of by the first grant to the Northern Pacific Railroad Company that the Government could not thereafter make another grant of the same lands to the same grantee, therefore, these lands were not granted by the joint resolution, and as they were not earned by compliance with the conditions prescribed in the original charter, they

necessarily reverted to the United States by virtue of the forfeiture act.

The Supreme Court has by a line of decisions, construed the acts granting lands to our transcontinental railroads so that there is now no room for controversy, as to the time when the grant becomes attached to the particular lands which a railroad company may lawfully claim by virtue of its grant. The grant, although a grant *in praesenti*, is afloat and unattached to any particular lands until the line becomes definitely located by the filing of a map thereof in the General Land Office. The line of the Northern Pacific Railroad, from Wallula down the Columbia River to Portland, was never definitely located, therefore under the settled construction of the grant no lands contiguous to that line passed out of the possession or control of the Government. (U. S. vs. N. P. Ry. Co., 152 U. S. 284-300; U. S. vs. Oregon & Cal. Rd. Co., 176 U. S. 28-51.) In the case last cited the Supreme Court plainly decided that the grant to aid in the construction of the Northern Pacific Railroad down the Columbia River valley to Portland, did not at once transfer the title to the odd numbered sections within the exterior boundaries of the grant, but, as in the case of other grants, the lands remained free and subject to disposition to other grantees of the Government until such time in the future as the Northern Pacific Railroad Company should acquire a vested right to the particular lands, by definitely locating its line and filing a map thereof as prescribed by its charter. It has been said in the argument, that the natural topography of the country along the Columbia River between Wallula and Portland is

such that the railroad company could not locate a line for a railroad in any way so as to exclude the lands involved in this law suit from the boundaries of its grant, but that circumstance furnishes no basis whatever for construing the Northern Pacific charter differently from the way in which it has been construed heretofore. Congress might have given attention to the explorations and surveys which had been made for the Northern Pacific Railroad, and might have located the line of the road definitely, and fixed precisely the boundaries of the land grant, but the Court is not to presume that Congress did intend to definitely locate that part of the railroad, or to relieve the railroad company from the exaction of filing a map locating the line definitely, because by the decisions it is settled that Congress did not intend to do so.

Neither does the fact that the two grants which overlap each other in this case were made to the same grantee afford any ground for distinguishing this case from the case of U. S. vs. Oregon & Cal. Railroad Company. By the final determination of the Supreme Court in that case it is settled that the Government did have the right, notwithstanding the grant made to the Northern Pacific Railroad Company, by the act of July 2, 1864, to make another grant of lands within the same boundaries.

There is nothing to distinguish this case from the O. & C. R. Co. case, except the fact that, in this case both grants are to the same grantee. The difference is not of consequence. The first grant did not exhaust the power of the Government with respect to the lands in suit, neither was the capacity of the N. P. R. Co. to receive,

exhausted. The two grants may be regarded as separate contracts between the same parties, the United States Government in effect proposed to the Northern Pacific Railroad Company, to make a grant of these lands and other lands as part of the consideration for the construction of a road from Wallula to Portland, and afterwards proposed to make a grant of the same lands and other lands in consideration of an extension of the road to connect its two western termini; the railroad company was not required to construct both sections in order to perfect its right to these particular lands, but it was authorized to earn all the lands involved in this suit by constructing either one of the two distinct sections of the road, by completing both sections, other lands within the limits prescribed by the original grant, would have been earned, but no additional lands could be claimed on account of the overlap, because the grants are not of quantity, but only entitle the grantee to claim whatever lands fall within the limits defined.

It is my opinion that no reason has been shown for impeaching the validity of the patents, therefore, a decree will be entered that the United States take nothing, and that this suit be dismissed.

C. H. HANFORD,

Judge.

[Endorsed]: Filed in the United States Circuit Court, July 18, 1901. A. Reeves Ayres, Clerk. By Sam'l. D. Bridges, Deputy.

And afterwards, to wit, on the 2d day of August, 1901, there was duly filed in said court in said cause a decree, in the words and figures following, to wit:

Circuit Court of the United States, for the District of Washington, Western Division.

UNITED STATES OF AMERICA,
Complainant,

vs.

NORTHERN PACIFIC RAILROAD COMPANY (a Corporation), and NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),
Defendants.

No. 551.

Decree.

The above-entitled cause coming on to be heard, and having been submitted to the Court upon the pleadings therein and upon an agreed statement of facts signed by the solicitors of the respective parties, and on file herein; and said cause having been argued by counsel, and the Court being advised, it is, on motion of counsel for defendants—

Ordered, adjudged, and decreed that the bill of complaint of the complainant herein be and it is hereby dismissed for want of equity.

By the Court.

Dated, August 1, 1901.

C. H. HANFORD,
Judge.

[Endorsed]: Filed in the United States Circuit Court. August 2, 1901. A. Reeves Ayres, Clerk. By Sam'l D. Bridges, Deputy.

And afterwards, to wit, on the 30th day of January, 1902, there was duly filed in said court in said cause exceptions, in the words and figures following, to wit:

In the United States Circuit Court, for the District of Washington, Western Division.

UNITED STATES OF AMERICA,
Complainant,
vs.
NORTHERN PACIFIC RAILROAD COMPANY (a Corporation), et al.,
Defendants.
No. 551.

Exceptions to Decree.

Comes now Edward E. Cushman, Assistant United States Attorney, and excepts to that certain order, judgment and decree made and signed herein on the 1st day of August, 1901, and filed and entered herein on the 2d day of August, 1901, and to each and every part thereof, for and upon the ground that it is against the law and unsupported by the evidence, and pleadings, and further, asks that these, his exceptions, be allowed nunc pro tunc as of the 1st day of August, 1901.

EDWARD E. CUSHMAN,
Assistant United States Attorney.

Said exceptions are allowed nunc pro tunc as of the 1st day of August, 1901.

C. H. HANFORD,
Judge.

[Endorsed]: Filed in the United States Circuit Court, District of Washington. January 30, 1902. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

And afterwards, to wit, on the 30th day of January, 1902, there was duly filed in said court in said cause an assignment of errors, in the words and figures following, to wit:

In the Circuit Court of the United States, for the District of Washington, Western Division.

UNITED STATES OF AMERICA,
Complainant and Appellant,
vs.
NORTHERN PACIFIC RAILROAD COMPANY (a Corporation), and NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),
Defendants and Respondents.
No. 551.

Assignment of Errors.

Comes now, on this 30th day of January, 1902, the above-named plaintiff and appellant, by Edward E. Cushman, its attorney and solicitor, and Assistant United States Attorney for the District of Washington, and for its assignment of errors herein says:

That in the record and proceedings in the above-entitled cause upon the hearing and determination thereof in the above-entitled Court, and in the decision, order, judgment and decree signed and made herein by the said Court in said cause under date and on the 1st day of August, 1901, and entered and filed herein on the 2d day of August, 1901, there is manifest error in this, to wit:

I.

The Court erred in making the order, judgment and decree above described.

II.

The Court erred in finding and deciding therein that there was want of equity in the bill of complaint of the complainant and appellant herein, and in dismissing the same.

III.

The Court erred in holding that the complainant and appellant herein was not the owner of the lands described in the bill of complaint and all of them.

IV.

The Court erred in holding that the defendant, the Northern Pacific Railroad Company, had earned said lands described in the bill of complaint or any of them by the construction of its road from Portland to Tacoma and that the defendant, the Northern Pacific Railway Company and the grantees of said company and those of the defendant, Northern Pacific Railroad Company, were the owners of said lands or any of them.

V.

The Court erred in holding that the grant to the Northern Pacific Railroad Company under the act of July 2d, 1864, and the filing by it of its map of route in the office of the Commissioner of the General Land Office on August 13th, 1870, did not except and withdraw the lands described in the bill of complaint and all of them from any lands granted or intended to be granted by the United States to said railroad company by the joint resolution of May 31st, 1870, or other acts of Congress.

VI.

The Court erred in holding that the United States by the joint resolution of May 31st, 1870, granted to and intended to grant to the Northern Pacific Railroad Company the lands described therein and that such grant attached upon the filing in the office of the Commissioner of the General Land Office by the said company of its map of definite route from Kalama to Tenino on the 13th day of September, 1873.

VII.

That the Court erred in holding that the United States by the joint resolution of May 31st, 1870, granted and intended to grant to the Northern Pacific Railroad Company the lands described in the bill of complaint or any part hereof and that such grant attached upon the filing in the office of the Commissioner of the General Land Office by said company of its map of definite route from Kalama to Portland on the 22d day of September, 1882.

VIII.

That the Court erred in holding that by the act of September 29th, 1890, a forfeiture to the Government was not effected of the lands described in the bill of complaint and of all of them and further erred in holding that by that act said land would not be restored to the public domain.

It is not intended by the specifications of error numbered three to eight, inclusive, to thereby limit other errors and errors on the part of the Court included in that certain judgment, order and decree described and referred to in the assignments of error numbered one and two.

Wherefore, the above-named plaintiff and appellant prays that these his assignments of error be entered upon the record in this cause, and further prays that upon the hearing of this appeal that the order, judgment and decree above referred to be in all things reversed, and that the interest of plaintiff and appellant be adjudged to be the owner of the lands described in the bill of complaint, and that the defendants be decreed to have no right, title or interest therein and that all patents issued to them or either of them be canceled and held for naught.

EDWARD E. CUSHMAN,
Assistant United States Attorney.

[Endorsed]: Filed in the United States Circuit Court, District of Washington. Jan. 30, 1902. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

And afterwards, to wit, on the 30th day of January, 1902, there was duly filed in said court in said cause a petition and claim of appeal, in the words and figures, following to wit:

In the Circuit Court of the United States, for the District of Washington, Western Division.

UNITED STATES OF AMERICA,
Complainant and Appellant,

vs.

NORTHERN PACIFIC RAILROAD COMPANY (a Corporation), and NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),
Defendants and Respondents.

No. 551.

Petition and Claim of Appeal.

Comes now the above-named plaintiff and appellant, by Edward E. Cushman, Assistant United States Attorney, and deeming itself aggrieved by the order, judgment and decree made and signed herein on the 1st day of August, 1901, and entered and filed herein on the 2d day of August, 1901, hereby appeals from said order, judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors filed herewith, and plaintiff prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order, judgment and decree was made, duly authenticated, may be sent to the United States Circuit

Court of Appeals for the Ninth Circuit and to the clerk thereof by this Court and the clerk hereof.

Dated this 30th day of January, 1902.

EDWARD E. CUSHMAN,
Assistant United States Attorney.

The foregoing petition and claim on appeal is allowed. Done in open court this 30th day of January, 1902.

C. H. HANFORD,
District Judge.

[Endorsed]: Filed in the United States Circuit Court, District of Washington. January 30, 1902. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

And afterwards, to wit, on the 30th day of January, 1902, there was duly filed in said court in said cause an order in the words and figures following, to wit:

In the Circuit Court of the United States, for the District of Washington, Western Division.

UNITED STATES OF AMERICA,
Complainant and Appellant,

vs.

NORTHERN PACIFIC RAILROAD COMPANY (a Corporation), and NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),
Defendants and Respondents.

No. 551.

Order as to Transmission of Original Exhibits.

This matter coming on upon the motion of Edward E. Cushman, Assistant United States Attorney, for an order

directing the clerk to transmit the original exhibits in this case, with the record on appeal, to the Circuit Court of Appeals for the Ninth Circuit, and the Court being fully advised and said exhibits appearing impossible of reproduction in printed record;

It is hereby ordered that all exhibits on file herein be transmitted by the clerk of this Court with the record on appeal to the clerk of the Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 30th day of January, 1902.

C. H. HANFORD,
District Judge.

[Endorsed]: Filed in the United States Circuit Court, District of Washington. January 30, 1902. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, for the District of Washington, Western Division.

UNITED STATES OF AMERICA, Complainant and Appellant, vs. NORTHERN PACIFIC RAILROAD COMPANY (a Corporation), and NORTHERN PACIFIC RAILWAY COMPANY (a Corporation), Defendants and Respondents.	No. 551.

Citation.

To the Northern Pacific Railroad Company, and the Northern Pacific Railway Company, Defendants and

Respondents in the Above-entitled Cause, and to Crowley & Grosscup, F. M. Dudley, Stevens & Bunn and James B. Kerr, Their Attorneys and Solicitors:

You and each of you are hereby cited and admonished to be and appear at a term of the Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, State of California, within thirty days from the date of this citation, to wit, on the 1st day of March, 1902, pursuant to the appeal filed in the clerk's office of the Circuit Court of the United States for the District of Washington, in the above-entitled case and action wherein the United States of America is plaintiff and appellant and the Northern Pacific Railway Company and the Northern Pacific Railroad Company are defendants and respondents, to show cause, if any there be, why the decision, judgment and order in said appeal mentioned should not be reversed and set aside and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 30th day of January, 1902.

[Seal of the Court]

C. H. HANFORD,
District Judge.

In the Circuit Court of the United States, for the District of Washington, Western Division.

UNITED STATES OF AMERICA,
Plaintiff and Appellant,

vs.

NORTHERN PACIFIC RAILROAD COMPANY (a Corporation), and NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),
Defendants and Respondents.

No. 551.

Acceptance of Service.

Due and full service of the within citation on appeal upon the defendants and respondents is hereby acknowledged by the receipt of a copy of same this 30th day of January, 1902.

CROWLEY & GROSSCUP,
Attorneys and Solicitors for Defendants and Respondents.

F. M. DUDLEY,
Attorneys and Solicitors for Defendants and Respondents.

STEVENS & BUNN,
Attorneys and Solicitors for Defendants and Respondents.

JAS. B. KERR,
Attorneys and Solicitors for Defendants and Respondents.

[Endorsed]: Filed January 30, 1902. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

Clerk's Certificate to Transcript.

United States of America,
District of Washington, } ss.
Western Division.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States for the District of Washington, do hereby certify the writings hereto attached to be a full, true and correct transcript of the records and proceedings in case number 551, of the United States of America, Plaintiffs, against The Northern Pacific Railroad Company, and the Northern Pacific Railway Company, Defendants, as the same remain on file and of record in my office.

I do further certify the cost of preparing the foregoing transcript to amount to the sum of $49.50; which amount has been included in my quarterly account against the United States.

In witness whereof, I hereunto subscribe my name and affix the seal of said court at my office, in the city of Tacoma, in said District, this the second day of April, in the year of our Lord one thousand nine hundred and two.

[Seal]

A. REEVES AYRES,
Clerk.
By Sam'l D. Bridges,
Deputy Clerk.

In the Circuit Court of the United States, for the District of Washington, Western Division.

UNITED STATES OF AMERICA,
Complainant and Appellant,

vs.

NORTHERN PACIFIC RAILROAD COMPANY (a Corporation), and NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),
Defendants and Respondents.

No. 551.

Citation.

To the Northern Pacific Railroad Company and the Northern Pacific Railway Company, Defendants and Respondents in the Above-entitled Cause, and to Crowley & Grosscup, F. M. Dudley, Stevens & Bunn and James B. Kerr, Their Attorneys and Solicitors:

You, and each of you, are hereby cited and admonished to be and appear at a term of the Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, State of California, within thirty days from the date of this citation, to wit, on the 1st day of March, 1902, pursuant to the appeal filed in the clerk's office of the Circuit Court of the United States for the District of Washington, in the above-entitled case and action, wherein the United States of America is plaintiff

and appellant and the Northern Pacific Railway Company and the Northern Pacific Railroad Company are defendants and respondents, to show cause, if any there be, why the decision, judgment, and order in said appeal mentioned should not be reversed and set aside and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 30th day of January, 1902.

[Seal]

C. H. HANFORD,
District Judge.

In the Circuit Court of the United States for the District of Washington, Western Division.

UNITED STATES OF AMERICA,
Plaintiff and Appellant,

vs.

NORTHERN PACIFIC RAILROAD COMPANY (a Corporation), and NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),
Defendants and Respondents.

No. 551.

Acceptance of Service.

Due and full service of the within citation on appeal upon the defendants and respondents is hereby acknowl-

edged by the receipt of a copy of same this 30th day of January, 1902.

CROWLEY & GROSSCUP,
Attorneys and Solicitors for Defendants and Respondents.

F. M. DUDLEY,
Attorneys and Solicitors for Defendants and Respondents.

STEVENS & BUNN,
Attorneys and Solicitors for Defendants and Respondents.

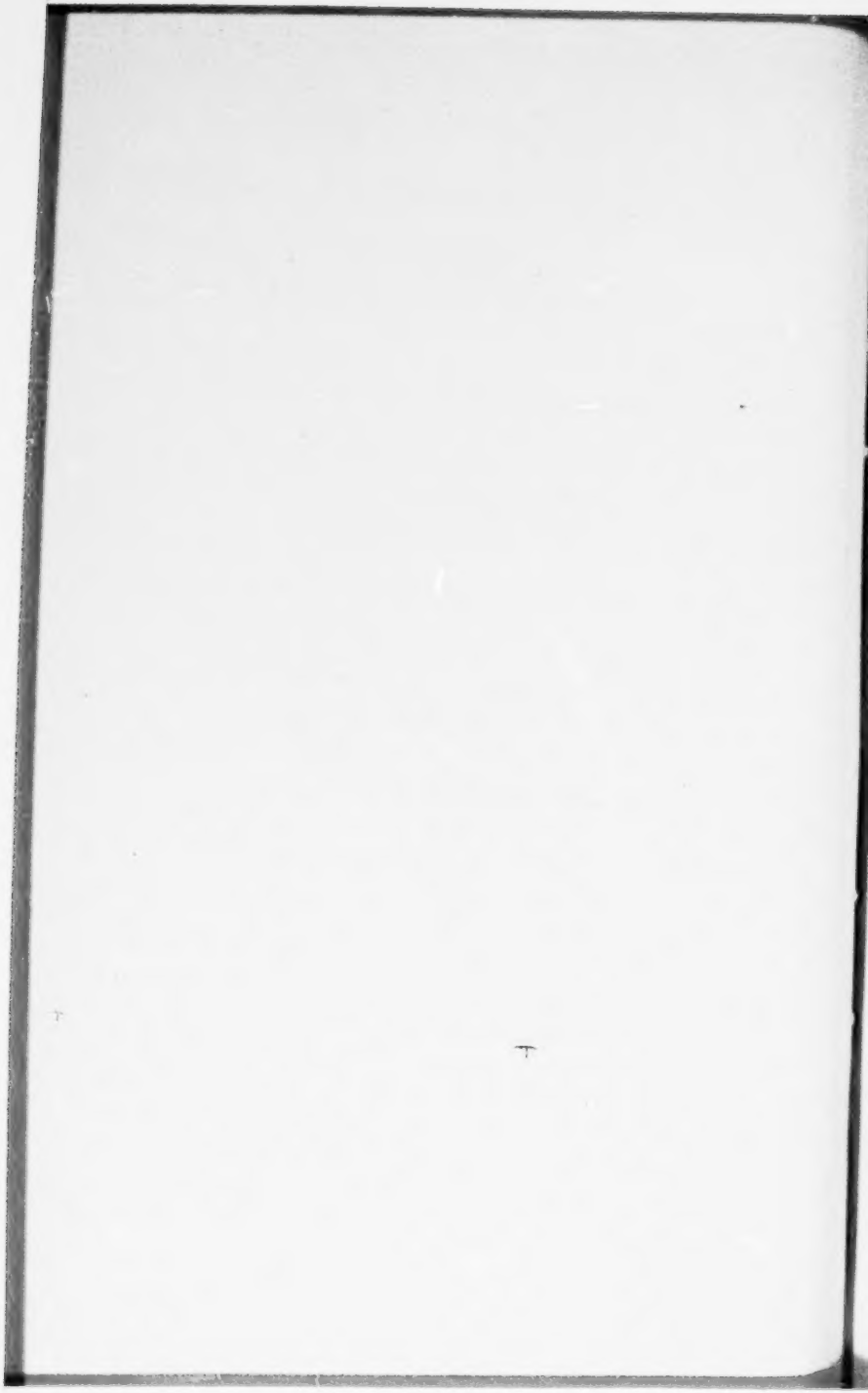
JAS. B. KERR,
Attorneys and Solicitors for Defendants and Respondents.

[Endorsed]: No. 551. In the Circuit Court of the United States for the District of Washington. The United States vs. The Northern Pacific Railway Company et al. Citation, With Acknowledgment of Service. Filed January 30, 1902. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

[Endorsed]: No. 822. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. The Northern Pacific Railroad Company, a Corporation, and the Northern Pacific Railway Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Washington, Western Division.

Filed April 10, 1902.

F. D. MONCKTON,
Clerk.



164 **Proceedings in the United States Circuit Court of Appeals for the Ninth Circuit.**

165 At a stated term, to wit, the October term, A. D. 1901, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the court room, in the city and county of San Francisco, on Wednesday, the twenty-eighth day of May, in the year of our Lord one thousand nine hundred and two.

Present: The Honorable William B. Gilbert, Circut Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable Thomas P. Hawley, District Judge.

THE UNITED STATES OF AMERICA, Appellant,
v.
THE NORTHERN PACIFIC RAILROAD COMPANY, a Corporation, et al., Appellees. } No. 822.

Order of Submission.

Ordered appeal argued by Wilson R. Gay, esquire, United States attorney, and J. A. Munday and C. E. S. Wood, esquires, counsel for the appellant, and James B. Kerr, esquire, counsel for the appellees, and submitted to the court for consideration and decision, with leave to counsel for the United States to file a reply brief within ten (10) days from date.

166 At a stated term, to wit, the October term, A. D. 1902, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the court room in the city and county of San Francisco, on Monday, the 14th day of October, A. D. 1902.

Present: The Honorable W. B. Gilbert, Circuit Judge; the Honorable E. M. Ross, Circuit Judge; and the Honorable W. W. Morrow, circuit judge.

THE UNITED STATES OF AMERICA, Appellant,
v.
THE NORTHERN PACIFIC RAILROAD COMPANY, a Corporation, and THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Appellees.
No. 822.

Appeal from the United States Circuit Court for the District of Washington, Western Division.

This case having come on to be heard upon the pleadings herein and the agreed statement of facts, upon an appeal whereby it is sought to review the decree of the Circuit Court of the United States for the District of Washington, Western Division, in a suit in equity brought by the United States to cancel patents for land issued to the Northern Pacific Railroad Company, and it
167 appearing to the court that the case presents issues and facts identical with those which were involved in the case of The United States v. The Oregon and California Railroad Company, decided by the Supreme Court of the United States and reported in 176 U. S., 28, with this difference, that the defendant The Northern Pacific Railroad Company is the grantee of both the grants of land, the overlapping portions of which are the subject of the controversy herein, and that this case is ruled by the decision of the Supreme Court in the case above referred to, unless the fact that the Northern Pacific Railroad Company, by reason of being the grantee of both said land grants, is estopped to question the sufficiency of its own maps to designate the boundaries of its grant by virtue of the act of July 2, 1864; and it appearing to the court that an early and final decision of said question is of great public importance, since it involves the rights of a large number of settlers on the lands in controversy, and that this is a case which is appealable to the Supreme Court from the decision of this court;

It is ordered that the following questions of law be, and the same are hereby, certified to the Supreme Court of the Uuited States for its determination:

1. Did the Perham map which was transmitted to the Secretary of the Interior March 6, 1865, and the maps filed by the Northern Pacific Railroad Company in the office of the Secretary of the Interior on July 30, 1870, sufficiently designate as between the grantor and the grantee of said land grant to said railroad company of July 2, 1864, the boundaries of the grant in aid of that portion of the road which was described as the branch via the valley of the Columbia River to a point at or near Portland, in the State of Oregon, so that none of those lands were included in the subsequent grant by the joint resolution of May 31, 1870, in aid of the line of road from a point
168 at or near Portland to a point on Puget Sound?

2. Are the appellees estopped by reason of the filing of said maps to deny, as against the suit of the United States, the sufficiency of the said maps to designate the boundaries of that portion of the grant of July 2, 1864, in aid of said branch line?

3. In view of the facts referred to and recited in the questions above, was it the intention of the joint resolution of May 31, 1870, to include in the grant in aid of the line of road from a point at or near Portland to a point on Puget Sound any of the lands within the place limits of the line so designated on said maps?

THE UNITED STATES OF AMERICA, Appellant,
v.
THE NORTHERN PACIFIC RAILROAD COMPANY, a Corporation, and THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Appellees. } No. 822.

Certificate of Clerk U. S. C. C. A. to Transcript.

I, Frank D. Monckton, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and sixty-eight (168) pages, numbered from one (1) to one hundred and sixty-eight (168), inclusive, to be a true copy of the printed transcript of record, the order of submission entered on the 28th day of May, 1902, and the order certifying certain questions to the Supreme Court of the United States, entered on the 14th day of October, 1902, and that the same, in connection with original Exhibits "B" and "C," this day transmitted to the Clerk of the Supreme Court of the United States, constitute a certified copy of the record under said order of the Circuit Court of Appeals certifying certain questions in the above-entitled cause to the Supreme Court of the
170 United States.

Attest my hand and the seal of said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 14th day of October, A. D. 1902.

[SEAL.]

F. D. MONCKTON,
Clerk.

13213

171 *Supreme Court of the United States, October term, 1902.*

THE UNITED STATES,
Appellant,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY ET AL.
No. 477.

On consideration of the motion for a writ of certiorari to bring up the entire record and cause, and that the cause be advanced,

It is now here ordered by the court that said motion be, and the same is hereby, granted, the transcript of record submitted with the motion to stand as a return to the writ, and the cause is advanced and assigned for argument on Monday, October 19th, 1903.

Per Mr. CHIEF JUSTICE FULLER.

NOVEMBER 17, 1902.

O

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 148.

THE UNITED STATES, PETITIONER,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY AND THE NORTHERN PACIFIC RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

CERTIFICATE FILED OCTOBER 30, 1908.
CERTIORARI AND RETURN FILED NOVEMBER 17, 1908.

(18,705.)

(18,705.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 145

THE UNITED STATES, PETITIONER,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY AND THE NORTHERN PACIFIC RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Original.	Print.
Exhibit A—Certified copy of map of the United States issued by the General Land Office, and showing a line of route surveyed by Governor Stevens; also marked map of general route of 1865—Perham's map	1	1
Order to file Exhibit B	3	3
Stipulation to file Exhibit B	4	3
Exhibit B—Certified copy of map showing location of the Northern Pacific railroad from its initial point on Lake Superior, in Wisconsin, to the Columbia river, in Washington Territory	5	4
Order to file Exhibit C	8	5
Stipulation to file Exhibit C	9	5
Exhibit C—Certified copy of map showing the location of the Northern Pacific railroad from its initial point on Puget sound via the valley of the Columbia river to the mouth of the Walla Walla river	10	6
D—Certified copy of map showing a portion of the constructed line of the Northern Pacific railroad, sixty-five miles from Kalama, W. T., northward	14	7

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 20, 1903.

INDEX.

	Original.	Print.
Exhibit E—Certified copy of so much of the original diagram prepared by the General Land Office, and now on file there, as shows the withdrawals which were made for the benefit of the grant to the Northern Pacific Railroad Company on definite location of the grant between Portland, Oregon, and Tenino, Washington.	15	9
F—Certified copy of map showing located line of the Northern Pacific railroad from Kalama, in Washington, to Portland, in Oregon	17	11
G—Certified copy of so much of the original diagram prepared by the General Land Office, and now on file there, as shows the lands affected by the ruling of the Department of the Interior of July 18, 1895, in the case of Spaulding *vs.* Northern Pacific Railroad Company (21 L. D., 57), as modified July 9, 1896 (23 L. D., 70)	19	13

EXHIBIT A.

"L." 4–207. H. K.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Feb.* 24, 1900.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed map of the United States, issued by the General Land Office, and showing a line of route surveyed by Governor Stevens, is a true and literal exemplification of so much of the official map on file in this office, as it purports to represent.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

Seal United States General Land Office.

BINGER HERMANN,
Commissioner of the General Land Office.

(Here follows map marked p. 2.)

[Endorsed on back of map:]

A. U. S. *vs.* N. P. R'y Co. U. S. circ. court. # 551. Exhibit A. . R. Gay, U. S. att'y; James B. Kerr, for def'ts. Filed July 1, 1901. Reeves Ayres, clerk, by A. N. Moore, deputy.

J. No. 822. U. S. circuit court of appeals for the ninth circuit. xhibit A. Received May 22, 1902. F. D. Monckton, clerk, by eredith Sawyer, deputy clerk.

Map of general route of 1865. Perham's map.

Received from Josiah Perham, president N. P. R. R., March 6, 65.

EXHIBIT B.

3 United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Appellant,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, a Corporation, and Northern Pacific Railway Company, a Corporation, Appellees.

Upon the stipulation of the parties, it is hereby ordered that the clerk of this court be and he is hereby directed to file the attached map marked Exhibit "B" as of May 28th, 1902.

Dated August 5, 1902.

By the court,

WM. W. MORROW, *Judge.*

4 United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Appellant,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, a Corporation, and Northern Pacific Railway Company, a Corporation, Appellees.

Whereas, in transmitting the record on appeal in the above entitled cause, that certain map marked Exhibit "B" and referred to in paragraph ten of the agreed statement of facts herein, said map showing the general route of the line of said Northern Pacific railroad, commencing at a point in the State of Wisconsin at the mouth of the Montreal river, thence westerly across the States of Wisconsin and Minnesota and the Territories of Dakota, Montana, Idaho and Washington, to the mouth of the Walla Walla river in Washington Territory, was lost or destroyed,

It is hereby stipulated by and between the parties hereto that the attached map, duly certified by the Commissioner of the General Land Office, is a true and correct copy of said map so lost or destroyed, and that an order may be entered herein upon this stipulation directing that the same be filed as a part of the return on appeal in this cause.

Dated August 1st, 1902.

UNITED STATES OF AMERICA, *Appellant,*
By EDWARD E. CUSHMAN,
Ass't U. S. Att'y & Its Counsel.
NORTHERN PACIFIC RAILROAD COMPANY AND
NORTHERN PACIFIC RAILWAY COMPANY, *Appellees,*
By C. W. BUNN,
JAMES B. KERR, *Their Counsel.*

5 "F."

4-207.

W. P. J. S. S. I

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July 24th*, 190

I, Binger Hermann, Commissioner of the General Land Office hereby certify that the annexed, being copy of map showing lo tion of the Northern Pacific railroad from its initial point on La Superior in Wisconsin to the Columbia river in Washington Ter tory is a true and literal exemplification from the original on in this office.

Seal United States General Land Office.

In testimony whereof I have he unto subscribed my name and caus the seal of this office to be affixed, the city of Washington, on the da and year above written.

BINGER HERMANN,
Commissioner of the General Land Office.

(Here follows map marked p. 6.)

[Endorsed on back of map:]

B. $12.00. Map of general route of the Northern Pacific R. R. from Montreal river, Wis., to the Walla Walla, W. T.
G. L. O. Map 1, tube 37. Received from Secretary of Interior with letter of Aug. 13, 1870, r'c'd same day. W. K. M. Same with-drawn by letter of Sept. 15, 1870. $\frac{1}{10}$. Map 1, tube 37.

7 [Endorsed:] D. No. 822. U. S. circuit court of appeals for the ninth circuit. Exhibit "B." Filed Aug. 5, 1902. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

MAP(S) IS/ARE TOO LARGE TO BE FILMED

EXHIBIT G.

19 F. 4–207*a*. S. S. M.

R. F. F.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 15, 1900.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed is a true and literal exemplification of so much of the original diagram prepared by this office, and now on file herein, as shows the lands affected by the ruling of the Department of the Interior of July 18, 1895, in the case of Spaulding *v.* Northern Pacific Railroad Company, (21 L. D., 57), as modified July 9, 1896, (23 L. D., 70).

Seal United States General Land Office.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

BINGER HERMANN,
Commissioner of General Land Office.

(Here follows map marked p. 20.)

[Endorsed on back of map:]

G. J. No. 822. U. S. circuit court of appeals for the ninth circuit. Exhibit G. Received May 22, 1902. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk. G.

21 (Endorsed:) U. S. A. *vs.* N. P. R'y Co. Delivered to U. S. marshal, N. D. Cal. No. 822. U. S. circuit court of appeals for the ninth circuit. Original Exhibits A, D, E, F, & G. Received May 22, 1902 & delivered to U. S. marshal N. D. Cal. F. D. Monckton, clerk. By Meredith Sawyer, deputy clerk. Department of Justice. Northern district of California, return in 5 days to U. S. marshal's office, San Francisco, California. Official business. Penalty for private use, $300. James H. McKenney, Esq., clerk, Supreme Court U. S., Washington, D. C.

22 [Endorsed:] File No. 18,705. Supreme Court U. S., October term, 1903. Term No. 145. The United States, app't & petitioner, *vs.* The Northern Pacific R. R. Co. *et al.* Original Exhibits A, B, C, D, E, F, & G. Received from U. S. marshal, N. D. of Cal. Rec'd Nov. 4, 1902.

13232

No. 145

Joint Br. of Atty. Gen. (Pleading)

Burn on mo. to bring up whole cause

Office Supreme Court U.S.
FILED
NOV 10 1902
JAMES H. MCKENNEY,
Clerk

Filed Nov. 10, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

UNITED STATES OF AMERICA, APPELLANT,
v.
NORTHERN PACIFIC RAILROAD COMPANY, A corporation, and Northern Pacific Railway Company, a corporation, appellees.

No. 145

PENDING ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION TO REQUIRE THE WHOLE CAUSE TO BE SENT UP FROM CIRCUIT COURT OF APPEALS, AND MOTION TO ADVANCE; OR, IF THE WHOLE CAUSE IS NOT SENT UP, TO DISMISS FOR WANT OF JURISDICTION.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

UNITED STATES OF AMERICA, APPELLANT,
v.
NORTHERN PACIFIC RAILROAD COMPANY, A corporation, and Northern Pacific Railway Company, a corporation, appellees. } No. 477.

PENDING ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION TO REQUIRE THE WHOLE CAUSE TO BE SENT UP FROM CIRCUIT COURT OF APPEALS, AND MOTION TO ADVANCE; OR, IF THE WHOLE CAUSE IS NOT SENT UP, TO DISMISS FOR WANT OF JURISDICTION.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Come now the parties to the above-entitled cause and join in moving the court as follows:

I.

For an order requiring the whole record in the cause above entitled to be sent up by the circuit court o appeals to this court for its consideration.

II.

For an order advancing the said cause for hearing before this court, upon the ground that the United

States is concerned in said cause and upon the ground that it involves matters of general public interest.

III.

If the whole record is not sent up, for an order dismissing the said cause upon the ground that this court has no jurisdiction thereof under the certificate from the circuit court of appeals.

The foregoing motions are based on the record, a certified copy of which is herewith submitted, and on the certificate of the questions arising upon the record, a copy of which is hereto attached marked "Exhibit A," and upon the brief hereto attached.

J. K. RICHARDS,
Solicitor-General, Counsel for the United States, Appellant.
C. W. BUNN,
Counsel for the Appellees.

BRIEF.

This is a suit in equity which was commenced in the circuit court of the United States for the district of Washington, western division. It was brought by the United States to cancel certain patents for lands issued to the Northern Pacific Railroad Company. The facts put in issue by the bill, answer, and replication were made the subject of an agreed statement (Record, pp. 76 to 137), and are in brief as follows:

By act of Congress approved July 2, 1864 (13 Stat., 365), lands were granted to the Northern Pacific Railroad Company to aid in the construction of a line of railroad from a point on Lake Superior to some point on Puget Sound, with a branch *via* the valley of the Columbia River to a point at or near Portland, in the State of Oregon.

By joint resolution of Congress approved May 31, 1870, a further similar grant of lands was conferred upon the Northern Pacific Railroad Company for a line of railroad from a point at or near Portland to Puget Sound. By the terms of this joint resolution the proposed line down the valley of the Columbia River was designated as the "main line" and that portion of the line over the Cascade Mountains previously designated as the "main line" was designated as the "branch line."

On March 6, 1865, Josiah Perham, president of the Northern Pacific Railroad Company, transmitted to the Secretary of the Interior a sketch of the "general line" of the Northern Pacific Railroad. A copy of this map accompanies the record and is marked "Exhibit A." It shows two lines, commencing on Lake Superior, running westerly and converging near the eastern boundary of the then Territory of Dakota, and one line extending west therefrom to a point in the then Territory of Washington, near the Columbia guide meridian. From this point one line extends southwest along the valley of the Columbia River to a point near Portland, thence north to Puget Sound, while another line extends from the point of divergence over the Cascade Mountains, uniting with the first line on Puget Sound. This map was rejected by the Interior Department upon the ground that it was so indefinite as to give no basis for any withdrawals of public land and for the reason that in other respects it was not in conformity with the existing rules and regulations of the Department. (Record, pp. 85 to 95)

On July 30, 1870, two maps of general route were transmitted to the Secretary of the Interior, copies of which accompany the record and are marked "Exhibits B and C." One of these maps shows a line starting at the mouth of the Montreal River, on the boundary between Wisconsin and Michigan, and extending West to a point at the mouth of the Walla Walla River, in the then Territory of Washington. The other shows a line starting at the mouth of the Walla Walla River,

extending down the valley of the Columbia River to a point near Portland, thence north to a point on Puget Sound. These maps were, on August 13, 1870, transmitted by the Secretary of the Interior to the Commissioner of the General Land Office with instructions to withdraw from sale and entry lands within 20 miles on each side of the route so designated; and under these instructions the Commissioner withdrew lands within the prescribed limits. (Record, pp. 95 to 104.)

On September 13, 1873, under the joint resolution of May 31, 1870, the Northern Pacific Railroad Company filed its map of definite location of a portion of the line from a point near Portland to Puget Sound, namely, from Kalama to Tenino in the then Territory of Washington.

On September 22, 1882, under the joint resolution, the Northern Pacific Railroad Company filed its map of definite location of that portion of its line from Kalama to Portland. Both of these maps were approved by the Interior Department. (Record, pp. 104, 105.)

September 29, 1890, Congress passed an act entitled "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and other purposes," and resumed the title to all lands theretofore granted to aid in the construction of any railroad wherever the railroad opposite thereto had not been constructed. (Record, pp. 107, 108.)

All the lands described in the bill are situated opposite to and within the place or primary limits of the

grant as defined by the maps of definite location of 1873 and 1882, extending from Portland to Tenino. All of the lands described in the bill are also situated opposite to and within 40 miles of that portion of the line shown upon the Perham map of 1865 and the general route map of 1870, extending down the valley of the Columbia River to a point near Portland, and all the lands are likewise situated opposite to and within 40 miles of the line shown on the Perham map and the map of 1870, extending northward from Portland to Puget Sound. (Record, pp. 133–134.) All of the lands described in the bill were on May 31, 1870, and on the dates of the filing of the maps of definite location opposite thereto, public land to which the United States had full title, not reserved or otherwise appropriated and free from preemption or other claims or rights, unless they were reserved or appropriated by reason of the grant to the Northern Pacific Company under the act of July 2, 1864, and the maps filed and acts of the company performed in pursuance thereof. (Record, p. 134.)

The line of road extending from Portland by way of Kalama and Tenino to Puget Sound was duly constructed and approved under the provisions of the joint resolution of May 31, 1870. (Record, pp. 134, 135.) No portion of the road along the valley of the Columbia River to a point at or near Portland has ever been definitely located or constructed.

On May 23 and May 27, 1895, the United States executed and delivered to the Northern Pacific Railroad

Company letters patent for all the lands described in the bill. (Record, pp. 135, 136.)

The Northern Pacific Railway Company, a corporation organized under the laws of Wisconsin, has succeeded to all the right and title of the Northern Pacific Railroad Company to the lands in controversy, except that a large portion of the lands were, previous to the institution of the suit, sold for value to purchasers in good faith. (Record, pp. 136, 137; pp. 140 to 142.)

The lands involved in this suit aggregate about 51,569 acres.

In the courts below it was contended by the United States that under the provisions of the original granting act of July 2, 1864, and by reason of the filing of the so-called "Perham map" in 1865, the lands within 40 miles of the line so defined were reserved, withdrawn and appropriated, and were therefore not public lands of the United States on May 31, 1870, when the grant by the joint resolution approved on that day was made, and did not therefore pass to the Northern Pacific Railroad Company, although such reservation and appropriation, if any, was for the benefit of the Northern Pacific Railroad Company. The circuit court held that the case was controlled by the decision of this court in *United States* v. *Oregon and California R. R. Co.* (176 U. S., 28); and upon the strength of this decision dismissed the bill. The opinion of the circuit court is contained in the record, on pages 144 to 148.

The circuit court of appeals has certified to this court three questions, as follows:

1. Did the Perham map which was transmitted to the Secretary of the Interior March 6, 1865, and the maps filed by the Northern Pacific Railroad Company in the office of the Secretary of the Interior on July 30, 1870, sufficiently designate as between the grantor and the grantee of said land grant to said railroad company of July 2, 1864, the boundaries of the grant in aid of that portion of the road which was described as the branch *via* the valley of the Columbia River to a point at or near Portland in the State of Oregon, so that none of those lands were included in the subsequent grant by the joint resolution of May 31, 1870, in aid of the line of road from a point at or near Portland to a point on Puget Sound?

2. Are the appellees estopped by reason of the filing of said maps to deny as against the suit of the United States the sufficiency of the said maps to designate the boundaries of that portion of the grant of July 2, 1864, in aid of said branch line?

3. In view of the facts referred to and recited in the questions above, was it the intention of the joint resolution of May 31, 1870, to include in the grant in aid of the line of road from a point at or near Portland to a point on Puget Sound any of the lands within the place limits of the line so designated on said maps?

I.

It is apparent from the foregoing statement that any instruction given by this court in response to the cer-

tified questions will not determine the controversy. As above stated, the Perham map was rejected by the Interior Department, and the effect of such rejection is not presented by the certified questions.

II.

In support of the motion to advance the cause it is submitted that the case is one in which the United States is concerned under the fifth subdivison of rule 26, for the reason that the United States is complainant; and that within the same rule the case involves matters affecting the general public interest for the reason that a large portion of the lands involved are held by persons who have purchased in good faith from the railroad company. The administration of all that portion of the Northern Pacific grant lying in the disputed limits must be delayed until the final determination by this court of the questions involved.

III.

The motion to dismiss for want of jurisdiction is submitted for the reason that, under the rule laid down by the decisions of this court, it appears doubtful if the certificate is in such form that the court will feel justified in considering the questions certified. It was held by this court in *McHenry* v. *Alford* (168 U. S., 651–659) that a certificate which failed to contain a statement of the facts upon which the questions of law arose would not be considered for the reason that their consideration would require an examination by the court of the whole record. The certificate in this case

fails to contain such statement, but sets forth that the facts upon which the questions of law arise are the same as those presented by the record in *United States* v. *Oregon and California R. R. Co.* (176 U. S., 28.) This requires the court to consider the whole record in the Oregon and California case—equivalent, we suggest, to requiring the court to consider the whole record in *this* case. It was, moreover, held in *Columbus Watch Co.* v. *Robbins* (148 U. S., 266) that this court had no jurisdiction to consider questions certified by the circuit court of appeals where the certificate failed to show that the members of that court were in doubt as to the proper determination of such questions, or that they desired the instruction of this court. The certificate in the present case fails to show that the judges of the circuit court of appeals are in doubt as to the proper determination of the questions certified or that they desire the instruction of this court. The certificate merely states that the case is one of which this court would have jurisdiction on appeal and is one in which an early and final decision is of public importance.

Respectfully submitted.

J. K. RICHARDS,
Solicitor-General,
Counsel for the United States, Appellant.

C. W. BUNN,
Counsel for Appellees.

EXHIBIT A.

At a stated term, to wit, the October term, A. D. 1902, of the United States circuit court of appeals for the ninth circuit, held at the court room in the city and county of San Francisco on Monday, the 14th day of October, A. D. 1902.

Present: The Hon. W. B. Gilbert, circuit judge; the Hon. E. M. Ross, circuit judge, and the Hon. W. W. Morrow, circuit judge.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
THE NORTHERN PACIFIC RAILROAD COMPANY, a corporation, and The Northern Pacific Railway Company, a corporation, appellees. } No. 822.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF WASHINGTON, WESTERN DIVISION.

This case having come on to be heard upon the pleadings herein and the agreed statement of facts, upon an appeal whereby it is sought to review the decree of the circuit court of the United States for the district of Washington, western division, in a suit in equity brought by the United States to cancel patents for land issued to the Northern Pacific Railroad Company, and it appearing to the court that the case presents issues and facts identical with those which were involved in the case of *The United States* v. *The Oregon and California Railroad Company*, decided by the Supreme Court of the United States and reported in 176 U. S., 28, with

this difference, that the defendant, The Northern Pacific Railroad Company, is the grantee of both the grants of land, the overlapping portions of which are the subject of the controversy herein, and that this case is ruled by the decision of the Supreme Court in the case above referred to unless the fact that the Northern Pacific Railroad Company by reason of being the grantee of both said land grants is estopped to question the sufficiency of its own maps to designate the boundaries of its grant by virtue of the act of July 2, 1864; and it appearing to the court that an early and final decision of said question is of great public importance, since it involves the rights of a large number of settlers on the lands in controversy, and that this is a case which is appealable to the Supreme Court from the decision of this court:

It is ordered that the following questions of law be, and the same are hereby, certified to the Supreme Court of the United States for its determination:

1. Did the Perham map which was transmitted to the Secretary of the Interior March 6, 1865, and the maps filed by the Northern Pacific Railroad Company in the office of the Secretary of the Interior on July 30, 1870, sufficiently designate as between the grantor and the grantee of said land grant to said railroad company of July 2, 1864, the boundaries of the grant in aid of that portion of the road which was described as the branch via the valley of the Columbia River to a point at or near Portland in the State of Oregon, so that none of those lands were included in the subsequent grant by the joint resolution of May 31, 1870, in aid of the line of road from a point at or near Portland to a point on Puget Sound?

2. Are the appellees estopped by reason of the filing of said maps to deny as against the suit of the

United States the sufficiency of the said maps to designate the boundaries of that portion of the grant of July 2, 1864, in aid of said branch line?

3. In view of the facts referred to and recited in the questions above, was it the intention of the joint resolution of May 31, 1870, to include in the grant in aid of the line of road from a point at or near Portland to a point on Puget Sound any of the lands within the place limits of the line so designated on said maps?

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing to be a full, true, and correct copy of an order certifying certain questions to the Supreme Court of the United States in the case of *The United States of America, appellant*, v. *The Northern Pacific Railroad Co. et al.*, No. 822, as the same remains of record in my office.

Attest my hand and the seal of said circuit court of appeals at San Francisco, Cal., this 15th day of October, A. D. 1902.

[SEAL.]

F. D. MONCKTON, *Clerk*,
By MEREDITH SAWYER,
Deputy Clerk.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, PETITIONERS,
v.
THE NORTHERN PACIFIC RAILROAD COMPANY and the Northern Pacific Railway Company. } No. 748.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, PETITIONERS,
v.
THE NORTHERN PACIFIC RAILROAD COMPANY and the Northern Pacific Railway Company. } No. 145.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR UNITED STATES.

CHRONOLOGY.

NORTHERN PACIFIC RAILROAD.

July 2, 1864. Grant of lands eastward from Portland.
Mar. 6, 1865. Perham map transmitted to Secretary of Interior.
May 31, 1870. Grant of lands northward from Portland.
Aug. 13, 1870. General route maps of entire line filed.
Sept. 20, 1870. } Notices of withdrawal along general
Nov. 21, 1870. } route.
Sept. 13, 1873. } Maps of definite location filed.
Sept. 22, 1882. }
Sept. 29, 1890. Forfeiture act passed by Congress.
May 23, 1895 } Patents to lands in controversy issued.
May 27, 1895. }

July 25, 1866. Grant of lands.
Jan. 29, 1870. Map of definite location accepted.

This case, involving title to lands near Portland, was certified to this court by the circuit court of appeals of the Ninth circuit, for a determination of the following questions:

1. Did the Perham map which was transmitted to the Secretary of the Interior March 6, 1865, and the maps filed by the Northern Pacific Railroad Company in the office of the Secretary of the Interior on July 30, 1870, sufficiently designate as between the grantor and the grantee of said land grant to said railroad company of July 2, 1864, the boundaries of the grant in aid of that portion of the road which was described as the branch via the valley of the Columbia River to a point at or near Portland, in the State of Oregon, so that none of those lands were included in the subsequent grant by the joint resolution of May 31, 1870, in aid of the line of road from a point at or near Portland to a point on Puget Sound?

2. Are the appellees estopped by reason of the filing of said maps to deny, as against the suit of the United States, the sufficiency of the said maps to designate the boundaries of that portion of the grant of July 2, 1864, in aid of said branch line?

3. In view of the facts referred to and recited in the questions above, was it the intention of the joint resolution of May 31, 1870, to include in the grant in aid of the line of road, from a

point at or near Portland to a point on Puget Sound, any of the lands within the place limits of the line so designated on said maps?

The whole cause is now before the court upon certiorari.

The three questions certified by the circuit court of appeals show that that court was not troubled, as was the trial court, with the precedent supposed to precisely fit this case, viz, your decision in *United States* v. *Oregon and California* (176 U. S., 28), concerning lands overlapped at Portland by the Perham map and the Oregon and California grant south from Portland.

The trial court was misled by apparent similarities, which the court of appeals rightly ignored.

It perceived that the questions are wholly different, as are the facts.

Accordingly, this case should not be regarded as burdened with an adverse decision below, no reason whatever having been given for deciding it against the Government. It was argued, it seems, that Congress had not *power* to grant lands covered by a map of general route, and the trial court responded to that argument by merely citing the Oregon and California case to the contrary. The argument and response were wide of the mark.

The facts in this case differ from those in the Oregon and California.

The facts in the other case were that lands in a quadrangle southeast from Portland, lying within the boundaries of the Oregon and California grant of

1866, definitely located in 1869, road built immediately after, were claimed to be within the grant of 1864 to the Northern Pacific along the Columbia Valley to a point at or near Portland, as to which grant nothing had been done prior to such definite location except file the rejected Perham map, and the suit arose after the forfeiture act of 1890, when it was clear that no definite location or construction could ever take place. The question was, did the definite location and construction of the Oregon and California make the grant to that company carry the lands in view of such a state of facts? It was held that it did because the Perham map did not prevent Congress from having power to grant the lands to the Oregon and California and Congress had done so.

Certainly, in view of the character of the Perham map, in view of the actual and timely construction of the Oregon and California, and the failure of the other company to file even a proper map of general route, that may be said to be one of those good cases such as sometimes make bad precedents.

We do not say that this was a bad precedent, but only that it should not be carried beyond the particular points decided.

What then were the particular points decided?

That Congress can, if it sees fit, grant to a second grantee lands covered by such a map as the Perham map of 1865, even assuming it to be a good map of general route, which was not believed, and Congress had made such a grant in 1866 as would carry the

lands in 1869, in view of the failure of the first grantee to file a map of definite location before the forfeiture act of 1890.

Now, what are the facts in the present case?

We have a different Northern Pacific map, that of 1870, an actual withdrawal of the lands for that company, a different second grant, a Congressional elimination of doubtful elements as to the terminal point of the first grant at or near Portland, and *a peculiar and exceptional arrangement* between the Government and grantee to interpret, no question as to the superiority of the rights of one grantee over another under certain circumstances, but a pure question of Congressional intent in making that peculiar arrangement involving a second grant to one grantee to construct *one* road upon a modified scheme.

There is no overlap in this case, but a peculiar single scheme concerning one road and one grantee.

We need not dispute the power of Congress as affirmed in the other case or that Congress in such a grant as was there made intends to exercise it so as to give the later and diligent grantee the lands in the overlap under the circumstances there existing.

In this case the existence of an overlap is disputed, and the necessity for and intent of Congress to use its power as in the other case are denied.

We do not see how it could have been assumed by the trial court that these questions as to the true interpretation of the peculiar single arrangement of 1864–1870 between the Government and the Northern Pacific

Company could be settled by a decision which merely holds that Congress could and in a particular and wholly different case did give lands in an overlap of two grants of separate grantees for *two* roads to the second and diligent grantee. Nor did the court of appeals see how this case could be so decided.

We know of no case which does rule the present one. The facts are, as we have said, peculiar. In 1864 Congress made a grant to the Northern Pacific Company for a road from the east along the Columbia Valley to a point at or near Portland. Portland is just south of the river. The Perham map purported to locate the line and fixed Vancouver as the point near Portland, and this map was claimed as a good map of general route or of definite location and known to Congress as so claimed until the decision of this court, in 177 U. S., to the contrary. Next, in 1870, Congress made what has been held to be a new grant to the same company northward to Puget Sound, in order that a continuous line from the east via the Columbia Valley to Puget Sound should be constructed.

Does it follow because Congress may intend separate grants to separate companies to carry lands to one or the other in case of the diligence of one and inaction of the other, where the two grants might overlap, that it intended a first grant to a company and an additional grant to the same company, to construct *farther on* upon a continuous line of road, to give rise to any overlap or any possible competition between the two grants?

It seems to us the contrary is the natural intent to presume—that the second grant was to begin beyond the first, and by no possibility to overlap it and compete with it. It was made not independently of the first, but in view of it and as part of one scheme and was to be added to it.

Where there are two grantees with two separate roads, the contrary supposition is perhaps natural. They are strangers to each other, and the arrangement with one for one road has nothing to do with the contract with the other for another road. The schemes are not fitted into each other as one scheme. No attention is paid in arranging the second to the first. The language of the second is written as is the language of a grant where there is no first scheme. The companies are rival constructors. The Government has an interest in their rivalry and their diligence. The overlapping lands are under some circumstances a prize to stimulate their hopes. But it certainly has no interest in rewarding the same grantee for failing to carry out its contract under its first grant for the same road.

Certainly Congress *may* have a different intent when it makes a grant to another company for a distinct road from that which it has when it makes a second grant for a continuous road to the same company. Conceding that its intent to make a second grant of the same lands to the Oregon Company, a separate and rival grantee, was natural, so long as and on condition that there was an absence of the map of

definite location required by the granting act, it clearly does not follow that Congress did not consider in another light its second grant to the Northern Pacific Company for the same road.

The intent of the scheme of 1864–1870 can not be found by reading the Oregon and California case. Every granting act is a separate law and its intent is to be separately inquired into.

At different times to different grantees for different roads having nothing to do with each other as schemes of Congress, that body would have intents and a lack of intents accordingly; and in such cases it follows a set phraseology which ignores particular prior grants; but when it took up again in 1870 the old scheme of a road by the Northern Pacific Company and considered and modified that one scheme so as to provide for a single road from the East via the Columbia Valley to Puget Sound, it then *intended* to make an additional grant beyond where it then *expected* the first to end, which was *at least* 40 miles north of Portland, and as it no more had an expectation that the *one* road would be left unconstructed *near Portland* than it expected it to be so left at any other point on the line from the East to Puget Sound, it did not have the intent that what would thereby fail to pass under the first grant should be overlapped by and pass under the second. In 1870 it expected the one company to carry out the one scheme and did not contemplate a certain *partial* failure of it near Portland; whereas when it deals with two companies about two distinct roads and schemes,

it may perhaps contemplate the failure of one scheme as a whole, and its *intents* are based upon its knowledge and expectations. So, in 1866, when it made the Oregon and California grant, Congress had reason to contemplate that the whole Northern Pacific grant might fail, especially as nothing had been done but file the Perham map, and might well have considered the possibility of the Oregon Company taking the lands in the Portland overlap; but it had no reason in 1870 to contemplate a partial failure by the Northern Pacific Company to occur at Portland or at any other particular place, and had no intent based upon such an expectation.

The first grant took the road down the narrow valley of the Columbia River, in which it was to remain until it reached a point in that valley near Portland, to be selected by the company, unless it saw fit to leave the valley opposite Portland to the extent only of going into Portland. It was given no grant for a line *outside* of the valley of the Columbia River, and the point near Portland was evidently intended to be in the Columbia Valley. Portland itself is almost in that valley. The phrase "at or near Portland" evidently meant Portland or a point opposite Portland in the Columbia Valley. We do not see why the fact that Portland was an important commercial point, and the only one in the neighborhood, should be ignored in interpreting the phrase "at or near." Of course the company desired and the Government desired that the terminus should be at Portland, or practically so, in

order to get the business of that place and increase its business importance. In at or near, the near means, evidently, a very near point on one or other side *of the river*. It does not mean a point forty or fifty miles from Portland and certainly not a point south of Portland. The road would not terminate at a distance from the *river* commerce unless it did so *at* Portland, to get the commerce of that important place. From the point at or near Portland the road was to follow the narrow valley east.

The second grant was practically at right angles with the first, since the road was to follow the most direct route from Puget Sound to the connecting point. When the second grant was made it is clear from its terms that the connection of the two parts of railroad was expected by Congress to be either at Portland or immediately north thereof in the valley of the Columbia River, that is, on the river, for in the second grant the road *between Portland* and Puget Sound is required to be built within a certain time.

We thus have a line from Portland or just north of it in the valley of the Columbia east along the valley of the Columbia River and a line from the same point north. With all this in the mind of Congress, it is obvious that the first grant was understood by it to lie along the Columbia River and reach to Portland or a point on the Columbia River immediately north thereof. Could it have been the intention of Congress, in making the second grant to the same company, to include in that second grant the lands in question, all of which

clearly lie within 40 miles of the east and west line and within 40 miles of the north and south line? Must we not, on the contrary, understand that Congress in 1870 regarded these lands in suit as obviously in the first grant, and therefore that it had not the intent to grant them by the second grant?

It seems to us that no reasonable theory can cause any mind to ignore the obvious conception of Congress with regard to these lands. The facts are plain, and there is no unbending rule of law that we are aware of which requires them to be ignored. If a similar case arose between two neighboring farmers, an attorney would hesitate to ask that such things be ignored in determining their respective intents and equities. But we rely upon some of these considerations only in view of the fact that they are supplemented by others which were not in the Oregon and California case.

The Government is equitably entitled to some quadrangle as falling within the grant of 1864.

A line of road from due east was to end where a line of road from due north was to begin—at the same point. This was the situation down to 1890 and when the map of definite location of the second grant was filed. Now, wherever that point might have been, it was but one point for both roads, one reaching it from the east and one from the north. The right to locate the first continued down through the definite location of the other. Does it not follow from this that a quadrangle of lands equal in *quantity* to the quadrangle we here contend for was necessarily intended to

be omitted from the second grant? And if that is so, is it not equitable that we should recover in this suit, upon the extreme probability that the quadrangle we contend for is the right one, and is it not inequitable that this company should have so large a quantity of our lands in excess of the *quantity* intended to be granted? Is not the company, by definitely locating the road under the second grant to the point to which it did locate it, estopped to question the location of that quadrangle?

The knowledge and expectations of Congress in 1870 gave rise to and can interpret its intent in passing the resolution of 1870.

We need not insist that, for the purpose of passing "absolute title," anything less than a map of definite location would have sufficed, because Congress sees fit to expressly require such a map *for that purpose.* Nor need we insist that the language of the two grants and geography of the country sufficed to definitely locate the grant for any purpose; but we emphatically do insist that these things, coupled with the map of 1870, fixing the point at or near Portland and identifying particular lands—all these things, including the filing of such a map, being in contemplation and intended by Congress when it made the grant of 1870—sufficiently determined the lands Congress expected to have withdrawn and reserved and finally taken for the company under the act of 1864, and that it did not intend to deal with them again in making the grant of 1870 to the same company to have it continue the road to Puget Sound.

The resolution of 1870 provided for a road continuous of the original road; that is to say, the company was to construct "its main road to some point on Puget Sound via the valley of the Columbia River," and to speedily build so many miles "*between Portland* and Puget Sound." We thus have the peculiar condition of affairs that the road is continuous and the grants are separate and distinct. The second *grant* is not from Portland or to Portland. Its beginning is not expressly mentioned. It ends at Puget Sound. The *road*, however, is to be built to Portland. But as the resolution of 1870 is a separate grant and the road is continuous, it seems to be clear that what Congress had in mind was to make an additional grant beginning (that is, the half of it lying on the *east* side of the line of road) where it then naturally expected the other to end, without any overlapping or conflicting. If the company had built the whole road it would have taken the lands in question here under the first grant, and only under the first grant. Title clearly would have passed in 1864 and not in 1870.

Congress expected in 1870 that one whole road would be built and had no expectation that at any particular point a failure would occur.

Congress expected the whole road to be built, and had no intention about an uncompleted road until 1890. Its intentions must be harmonized with its expectation of having a whole road built. If upon building the whole road the lands in question would not have passed under the grant of 1870, but under the grant of 1864,

how can we attribute to Congress an intention to grant them under the resolution of 1870 because it afterwards turned out that the whole contemplated road was not built but a stoppage occurred at a particular point? Can a different meaning be given to the second grant because the company afterwards built only part of the road from that which it would have if it had built the whole road? It is just as clear that Congress intended a whole road and a continuous road as it is that it intended two separate grants along that road. It had no intention about these separate grants except as grants upon the continuous road. It had no intention to grant the same land twice, and having granted these lands by the act of 1864 upon a part of the continuous road, it had no intention to affect them in 1870, but merely made a separate grant so that the two grants might be adjacent ones along the continuous road. And it did not intend one grant to take provisionally by a map of general route what it obviously expected the prior grant to take provisionally by such a map and finally.

As we have said, in granting lands at different times to two grantees for separate roads Congress may contemplate and act upon the possibility that one road will not be built. In 1866, after two years, the Northern Pacific had done nothing when the Oregon grant was made; therefore Congress might contemplate and *provide for* a possible overlap. But it is not to be supposed that in making a grant or grants for one continuous line Congress contemplates the nonconstruction of part of it, and least of all that it has in

mind a noncompletion from any certain point on the one road. Congress, of course, no more expected in 1870 that the Northern Pacific Company would fail to build under the granting acts *near Portland* than that it would fail to build anywhere else. Consequently, the possibility of a failure in an *overlap* of the additional grant and that of 1864 was not contemplated, provided for, or the basis of any intent, and no overlap was intended to exist. The Oregon and California grant was not to be added to the Northern Pacific, but the grant of 1870 to Puget Sound was unquestionably to be added to and not to overlap the grant of 1864 to the Northern Pacific Company.

The first certified question, Whether the maps of 1865–1870 sufficiently identified the grant of 1864, as between grantor and grantee, to exclude the lands from the grant of 1870.

1. The first certified question, then, would have been easily answered in the affirmative.

The maps of 1865 and 1870, and the actual withdrawal of 1870, do not need to vest "absolute title" in order to show what lands were *not* intended to be given and taken under the grant of 1870. They all fix upon Vancouver as the point at or near Portland, and go east along the Columbia River. That being a separate grant from this of 1870, and the end of the expected location of this one on the continuous road being the intended beginning of the other, we thus have clearly demonstrated the beginning of the second grant as intended by Congress.

It begins beyond all of the lands in question, which are consequently not carried by it and never have ceased to belong to the United States.

It will be observed that the resolution of 1870 does not expressly make a grant from any point, but assumes that the beginning of the grant will be ascertainable. Does not this confirm the theory we are insisting upon that the second grant was intended to begin where the first grant was expected or understood to end? Congress could have said "from Portland" or from the *point* selected under the act of 1864, and this might have made an overlap. Had the second grant been to an independent grantee for a separate road Congress would have so expressed itself.

What is there in the case of *United States* v. *The Oregon and California*—what is there in the power of Congress to grant to one grantee what it has provisionally or partially granted to another independent grantee at another time for another road, that throws any light upon these propositions? Absolutely nothing.

The second certified question, Estoppel.

2. The second certified question, as to the "estoppel" of the company, would have been equally easy to answer.

Here have remained the Perham map and the map of 1870, and the requested withdrawal of 1870, for a quarter of a century or more, preventing up to 1890 the settlement of the country, which was one of the principal objects of the grant, and it does not lie in the mouth of the company at this late day, and after

settlement has taken place upon the faith of such maps and withdrawal, to say that the maps of 1865 and 1870 (which were identical at Portland, and without leaving the Columbia Valley could not well have differed), does not show the boundary of the grant of 1864 and, consequently, the boundary of the grant of 1870.

The company has had the full benefit in credit and opportunity afforded by the maps and withdrawal, and the Government and public it represents the loss and disappointment occasioned by its conduct. This is a court of equity, and will not listen to the proposition now that the boundary of the grant of 1870 was not where it has so long been represented by this conduct to have been. It will not, now that there can be no definite location, listen to the proposition that the company *might* have changed its mind to some extent as to the point at or near Portland on the Columbia River. There is no presumption that it would have done so, and as it has ceased to have the power, this court of equity will hold it to its choice, in order to accomplish equity between the parties.

For is it not inequitable to deprive the Government of these lands in suit when they lie well within every possible definite location conforming to the granting act—when the court knows that some such quadrangle of lands near Portland was not intended to be given or expected to be received or earned under the second grant of 1870, but to be forfeited, if the road should not be built, for noncompliance with that of 1864?

The very geography of the country, without any maps, demonstrates that the sections in suit are necessarily within the boundary of such lands, whether that boundary is considered as precisely fixed by the withdrawal or not. Will not a court of equity seize upon some means of fixing a boundary in such a case, or will it turn over all the lands to the party it knows was not intended to have them, merely because through his fault the boundary is not precisely known?

If it is not so precisely fixed, but in doubt, what gives the company the superior right to have the lands as properly passing under the grant of 1870 instead of the Government's retaining them as falling under the grant of 1864? If one grant was not intended to embrace lands expected to pass provisionally, and afterwards finally, under the other, and if the boundary of the first is in doubt, the same doubt must exist as to the limits of the adjacent one separated from it by that boundary.

What is not clearly and unmistakably granted belongs to the Government and it is error to patent it away. Doubt must make the grant fail. This is a familiar principle of land-grant law.

In *United States* v. *Southern Pacific Railroad* (146 U. S., 598), the court, in discussing the doctrine that, as a granting act is a law as well as a grant, and subsequent definite location under a prior grant displaces a title acquired by a prior location under a subsequent grant, says:

> So now, whatever may have been the dates of filing by the respective companies, the case

> stands as though the lands granted to the Atlantic and Pacific had been identified in 1866, and title had then passed, and there never was a title of any kind vested in the Southern Pacific Company.

So we say here, the Northern Pacific Company having located its grant by a map of general route which might possibly have been altered prior to 1890, "the case stands" as if that power had never existed and the location was a final one. This does not make it a compliance with the requirement of a map of definite location, in order to get absolute title to the lands withdrawn, but precludes the company from alleging that its grant was elsewhere than where it was located, in order to enlarge its second grant.

Where a granting act provides for a map of general route as well as a map of definite location, it provides for the passing of a provisional title to particular lands and for the passing of an absolute title to the same or other lands. When the map of general route is filed, the absolute title may well be regarded as a float, but the partial title can not be so regarded, because a float is a title to unidentified lands, and lands withdrawn under a map of general route are identified.

The company acquired a provisional title to particular partly surveyed lands by filing its map of 1870, and has long since ceased to have any right to acquire anything further or different, had such been attempted.

It might be contended that Congress did not intend the provisional map to establish the final boundary of this grant, because it provided for a final map of

these lands at Portland, which might at least slightly and theoretically have differed from this one. But it did intend the provisional location to furnish at least a provisional boundary, and in this suit between the Government and the company, what is to be the result of the failure of the company to fix the final boundary? Can the company say that Congress intended the map of *definite location* to furnish the final boundary and, there being no map of definite location, we are to take the second grant as intended to carry lands all the way down to and across the Columbia Valley?

If that is so, the company clearly gets lands under the second grant merely because it failed to carry out its contract under the first. Undoubtedly there was to be *a* boundary of the grant of 1864, and it was to be nearly if not absolutely where the general route map placed it. Whether nearly or absolutely, it would certainly have included the sections in suit within the grant of 1864.

As to both the supposed provisional and supposed final boundary, Congress permitted the company to fix them. The company fixed one and might have fixed, but did not, the other. Is it right and just to permit it to ignore its own line of provisional boundary, and, asserting that there is no boundary, claim lands which were obviously intended to be in the first grant, and to be forfeited for noncompliance with its terms?

It is the fault of the company if we can find no better boundary than the supposed provisional one. It is the result of its own negligence and breach of

contract with the grantor. The company and not the Government should lose by it, if anyone.

By the Resolution of 1870, accepted by the grantee, "at or near Portland" was in effect altered to via Vancouver.

The resolution of 1870, which of course was not in the *Oregon and California* case, provides for a line via the valley of the Columbia to Puget Sound, and requires the road between Puget Sound *and Portland* to be constructed within a certain time. Portland is just below the valley of the Columbia and *not* on the way from that valley to Puget Sound. If the resolution means that the company was to build to Portland, notwithstanding its route and grant are prescribed as *via the valley* to Puget Sound, what was the scheme of Congress and this company?

It seems to us that the Perham map, whether sufficient as a map of general route or not, was regarded as fixing upon Vancouver, just north of Portland, *in* the valley, as the point "near Portland" of the grant of 1864, and that Congress and the company, knowing that the first grant was to go to Vancouver and embrace lands on both sides *as far west* as Vancouver, intended to provide for a spur of railroad from Vancouver to Portland, but without disturbing the point *in the valley* from which the principal line and land grant were to go via the valley to Puget Sound. Doubtless the company had concluded to so proceed, and doubtless Congress was so informed. (See map of July 26, 1870.)

This theory reconciles the various parts of the resolution, and makes the resolution by amendment of the act of 1864 eliminate Portland from "at or near Portland." It also eliminates all points outside of the valley of the Columbia and all points *east* of the direct line from Puget Sound to Portland, since the roads were to *connect* or be a continuous road from the east via the valley to Puget Sound. Such eliminations, however, eliminate everything but Vancouver, and this confirms the natural theory that the Perham map and conduct of the company had in 1870 caused that point to be regarded as settled upon. This fixed Vancouver in 1870 as the terminus of the grant of 1864.

If not Vancouver, then Portland itself was fixed as the point by the resolution of 1870.

There is another reasonable interpretation of the act of 1870, namely, as amending that of 1864, with the consent of the grantee, by eliminating every point but Portland itself. The road is to reach from Puget Sound *to Portland.* The original road was to go to Portland *or* a point near it. From 1870 a continuous road from the East was to be built to Puget Sound. If the road was to be continuous and the part to be built under the second act was to end *at* Portland, was it not the intention of Congress that the other road, which was to continue it, should begin *at* Portland, and at Portland only? Could it have stopped several miles east or south of Portland? That might be *near* it; but what would then become of the continuity of the road from the east to Puget Sound? If the company could

not comply with the granting acts after 1870 by going thus to a point which is "near Portland," was not the act of 1864 amended by striking out "or near"? The survey of 1867, made for the company, crossed the river east of Portland and went to Portland; and in the debates of 1870 Portland, and only Portland, was mentioned as the terminus or connecting point.

By the Oregon and California grant all lands not "appropriated" were held to have passed. By the resolution of 1870, lands as to which there were any claims or rights were excepted. There was a claim or right under the act of 1864 when the grant of 1870 was definitely located.

But there is a theory, which seems to have been overlooked, equally conclusive of this case and constituting an answer to the third certified question. It concedes an overlap and would give indemnity lands to the company—a concession we do not consider necessary to make, or in accordance with the real facts and law of this controversy.

The terms of the grant to the Oregon and California and those of the joint resolution of 1870 (which adopts the terms of the act of 1864) are different. In the case of the Oregon road all lands not "appropriated" at the time of definite location were granted. This court so reads that grant, which contains the usual provision as to lands "granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise *disposed of*." Hence this court in *United States* v. *Oregon, etc.* (176 U. S., 28) assumes that the grant of

1866 passed at definite location all that Congress *was able* to grant (*ibid.*, p. 44). Only the Perham map had been filed when in 1869 the Oregon grant took effect by definite location, and although the Perham map indicated (if it was of any effect, which was doubted) a *claim* to lands under the Northern Pacific act of 1864, this did not prevent them from passing to the Oregon company, nor would a less vague and uncertain *claim* have had that effect.

But under the joint resolution of 1870 no grant was made of any lands except those "free from preemption or other *claims* or *rights*," at the time of definite location. Of this language the court says in *Northern Pacific Railroad Co.* v. *Musser-Sauntry Co.* (168 U. S., 608):

> Again, in the description are the words "free from preemption or other claims or rights." Certainly, after this withdrawal, the Wisconsin company had the right, if its necessities required by reason of a failure of lands in place, to come into the indemnity limits and select these lands. Can it be said that they were free from such right when the very purpose of the withdrawal was to make possible the exercise of the right? But the language is not simply "free from rights," but "free from claims," and surely the defendant railway company had an existing claim. No one can read this entire description without being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the

term, and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road. (*Northern Pacific Railroad* v. *Sanders*, 166 U. S., 620; see also *Newhall* v. *Sanger*, 92 U. S., 761).

In the case of *Southern Pacific Railroad Company et al.* v. *United States* (189 U. S., 447), the land in controversy was within the place limits of the Southern Pacific and the Texas Pacific Railroad companies, being land situated where the road of the former company and the contemplated track of the Texas and Pacific met at Yuma, on the Colorado River, in the southeastern corner of California. The Texas Pacific filed its map of general route and the Secretary of the Interior withdrew the lands from sale. The Southern Pacific road was built, but the Texas Pacific was never constructed. The Government contended that the land was excepted from the Southern Pacific grant, and this court, affirming the decisions of both lower courts, upheld that contention.

In that case, the grant to the Southern Pacific provided that it should "in no way affect or impair the rights, present or prospective" of the Texas Pacific Company, and the court went so far as to hold that this proviso excepted from the grant to the Southern Pacific the lands within the limits of the Texas Pacific as identified by the map of general route, notwithstanding the fact that the Southern Pacific Company filed its map of general route prior to the filing of such a map by the Texas Pacific.

In our case, the map of general route of the "branch" line was not filed first. It is true that in our case we have not the same proviso, but we have a similar provision (that excepting claims and rights) and one which, for the purposes of this case, is as effective as was the proviso in that case. The fundamental principle involved in that case was precisely the same.

Definite location of the new grant from Puget Sound toward Portland took place in 1873–1882.

Were the lands in controversy free from "claims" in those years?

At that time the map of general route had been filed and the lands in question withdrawn under the act of 1864. Were not this unquestioned map and the actual requested withdrawal a claim to these lands? Were they free from a most substantial right, being place lands withdrawn?

Was there not the exceptional right secured by section 6 of the granting act, which the minority of this court in *Nelson* v. *Northern Pacific* (188 U. S., 109), charge the majority with nullifying—a charge which the majority will hardly admit to be true. What that right is the majority do not say, merely denying that it prevented homestead and preemption claims or prevented Congress from disposing of the lands. But it must have been a right and an important one, although not yet explained or defined by the court. One way to reconcile sections 3 and 6 would seem to be to treat section 3 as intending not to authorize homesteading and preemption up to definite location, but definite

location as merely the time *to look for* homestead and preemption claims originated earlier and before the grant, so as to have priority of right over the railroad company. This would allow section 6 to mean what it says. However, it must mean something, and will not be nullified but reconciled with section 3. It certainly gave some "right" or "claim" under the act of 1864.

It may be remarked, in passing, that the lands in our case were not all unsurveyed and that the map of general route may have had a different effect from that which it had in the Nelson case. What is supposed to be the meaning of a withdrawal; are lands *withdrawn* from something or from nothing, and if from anything, from what? And for a purpose or for no purpose? Are they not at least claimed?

If there was this claim under the act of 1864, then in 1882, when the new grant of 1870 took effect by definite location from Puget Sound southward, that new grant for a new road (*United States* v. *Northern Pacific*, 152 U. S., 294; *Northern Pacific Railway Co.* v. *De Lacey*, 174 U. S., 628) did not embrace these *claimed* lands. And if it did not, then of course it never after could or can embrace them. They, therefore, have never ceased to be lands of the United States. They were not claimed under a *subsequent* grant, but a prior grant, and the fact that the claim was under a railroad land grant is immaterial. It has been held that in excepting lands granted before definite location Congress did not mean to expressly

retain the power to afterwards grant the same lands to another railroad company, as this would be to give and by the same instrument retain the right to give to another all of the same lands. This, it was said, would be repugnant to the grant. But there is no repugnancy in excepting a claim arising under a prior railroad grant.

"All that we here hold is that when a withdrawal of lands within indemnity limits is made in aid of an earlier land grant, and made prior to the filing of the map of definite location by a company having a later grant, the latter having such words of exception and limitation as are found in the grant to the plaintiff, it operates to except the withdrawn lands from the scope of the later grant." (*North. Pac. R. R. Co.* v. *Musser-Sauntry*, 168 U. S., 604; *Southern Pacific* v. *United States*, 189 U. S., 447; *In re Northern Pacific*, 31 Land Dec. 32, and cases cited.)

So these lands were excepted from the resolution of 1870 because claimed under the act of 1864 at the time of definite location under the resolution—in 1873–1882.

The case of Sioux City R. R. v. United States is not in point. Each granting law has its individual intent or scheme.

It has been suggested that the case of *Sioux City, etc., R. R.* v. *United States* (151 U. S., 349), has some bearing upon the construction of the resolution of 1870. That case involves a second grant to the same grantee, as does the present one, and it was held that,

contrary to the general rule, the second grant intended to embrace lands which had been reserved for indemnity lands under the first grant; that the second grant was an enlargement of the first and carried the reserved lands. But that case was decided, as this should be, by inquiring what was the intent of Congress in making the particular grant in question in view of the subject-matter with which it was dealing, and whether any reason existed for supposing that Congress meant to depart from its general rules. Congress had made a grant to the State for a road between certain termini, and then, finding the road not constructed, made a wider grant to the State for the construction of the same road between the *same termini*. The contention was that certain indemnity lands which had been reserved under the first grant for the same road were not intended to be included in the second and wider grant. But it obviously was the intention to simply widen the grant. That obvious intention was held to control a settled rule that reserved lands do not pass. But what has the ascertainment of Congressional intent under those very exceptional circumstances, to widen a grant which it found insufficient to induce the building of the one road between two termini, to do with ascertaining the intent in our case?

No rule was laid down which concerns our case; but an exception to a rule was found to have been made by Congress under exceptional circumstances. In our case there are no circumstances to indicate that

Congress was departing from this rule and making another exception. The mere fact that the grant was to the same grantee did not control the court's decision that lands reserved for indemnity purposes were granted by the second grant. The reason of the court's decision was that the grant was for the same road between the same termini. Congress did not expect two roads to be built between those termini, but only one, and there was no possibility of regarding a mere indemnity reservation under an arrangement which had failed and was to be replaced by the new one, as intended to stand in the way of the wider grant. In our case the grant of 1864 was, in 1870, intended to be *fulfilled* by the construction of the road east of Portland precisely as it was originally contemplated and under penalty of forfeiture of the grant of 1864. The reservation for that road is of place lands. There is no proposition to widen the grant between the East and Portland. Both the first and second roads were intended to be constructed. There is not one road between the same two termini, but roads between different termini under two grants, the second of which was to leave the first intact, to be carried out as originally intended. In short, there is no resemblance between the two cases, and the intention of Congress in the one can not enlighten us concerning its intention in the other. The intention in the present is to be learned from the terms of the grant and the settled construction of the terms used. That intention must be held to conform to the general rule and to the plain language used, in the absence of a

very strong reason to the contrary. Is it such a reason that the two grants are to the same grantee? Why so? Why should not Congress except from the second grant what was claimed and to be earned or forfeited under the first? It might better be asked, Why should it do other than that? And why should the company have asked it to do otherwise?

After withdrawal and general route map substantial rights to particular lands vest, there is no longer a float, the lands cease to be public and are not intended to pass under the usual language in subsequent grants.

4. It has been held in divers cases by this court that the railroad grants pass title *in præsenti*, but that the grant is a float until definite location. This doctrine is well settled, but has led to a confusion which causes it to be again and again questioned. The confusion has arisen from somewhat loose use of words and from borrowing the language of some early railroad cases.

Float is not a statutory word, but is a mere convenient phrase to signify something floating or in the air. The idea may have originated in the old case of *Rutherford* v. *Green*, in which the grant to General Green of a quantity of lands in Ohio was held to pass the title *in præsenti*, but required identification of the lands to make it apply to particular lands. In the earliest railroad cases in which we find the word "float," *Railroad Co.* v. *Fremont County* (9 Wall., 89, 94), *Railroad Co.* v. *Smith* (9 Wall., 95), *Schulenburg* v. *Harriman* (21 Wall., 44), *Leavenworth, &c., R. R. Co.* v. *U. S.* (92 U. S., 733), *Missouri, K., &c., R. R. Co.* v. *Kansas*

Pacific (97 U. S., 491), *R. R. Co.* v. *Baldwin* (103 U. S., 426), *Grinnell* v. *R. R. Co.* (103 U. S., 739), *Van Wyck* v. *Knevals* (106 U. S., 360), *St. Paul R. R.* v. *Winona* (112 U. S., 720), the grant was made and the line of the road was to be "definitely fixed," without always saying *how*. The court said that there was a float until this definite fixing. These are the cases which have led to the frequent reiteration of the proposition that there is a float until a *map* of definite location is filed. We do not dispute that; but what does it really signify? In those cases, except the M., K. & T. case in 97 U. S., where under *one* of the grants a general route map was to be filed, there was no prior thing to be done before "definitely fixing"—no map of general route, no withdrawal of lands, nothing between the passing of the law and the "definite fixing" of the line. In many cases there are intermediate steps provided for, but in nearly all of such cases the question has been when did the title vest and become absolute. The granting acts have usually left no doubt of that; it vests absolutely upon definite location and by relation from the date of the acts.

But this does not answer the question, What are the effects of taking the intermediate steps? That is an entirely different question, and requires separate consideration. Those steps can not be ignored. They are as much a part of the law as the other, and Congress is not to be supposed to do vain things.

From other decisions it appears that there are an "absolute title" and an inchoate or provisional or less than absolute title.

If there are two titles, or a right of some kind in or to the lands, and an absolute title, we may naturally expect two operations affecting them.

Both pass *in præsenti* when the law is enacted. Both float. Each ceases to float. But when does the lesser right cease to float? We answer, when the lands are identified. And when are they identified? When the map of general route is filed and the lands withdrawn by or under it. Then that qualified title vests and reaches its perfection; it never changes or improves or becomes more settled.

In the nature of things, this is so. It is unnecessary to examine the opinions by this court to ascertain this, since neither the court nor Congress can make that a float which is not floating or uncertain, but settled.

Upon general route map filed and withdrawal the grant "*took effect* upon *such odd-numbered sections* of public lands within the specified limits as were not excluded from its operation." (*Newhall* v. *Sanger*, 92 U. S., 761.) "The company acquired, *by fixing its general route*, only an inchoate right to the *odd-numbered sections* granted by Congress, and no right attached to any specific section until the road was definitely located and the map thereof filed and accepted. (*Shiver* v. *United States*, 159 U. S., 633.) Of course this means that a right is acquired to the odd-numbered sections along the general route, since it was the granting act and not the fixing of the general

route that gave an "inchoate right" to *unidentified* or unspecified sections.

For the court to say that the rights or the lands are floating after they are identified or settled would be to speak contradictions.

The words which have been somewhat loosely used are "grant," "title," and "lands." What is it that floats? Certainly not the grant as a grant. That is a law, complete, settled, and perfect from the beginning. It must be the title or titles, right or rights, or the lands. Sometimes this court speaks of the lands floating, as in the right of way case, in which the right of way was held to pass *in præsenti* and cut out a settler who went on before definite location, sometimes of the "grant," sometimes of the title. Is it not the lands that are supposed to float, since the title passes *in præsenti* and the granting act is complete when enacted? Neither of the *latter* need to be identified.

Now, when the act is passed, a right to file a map of general route and have lands withdrawn comes into existence. But no particular lands are affected by it. Are not particular lands affected by it after the map is filed? Has not the grantee a right in or to particular lands? Why not? And is it a float? How can it be so? Is it any less an actual, substantial right in or to particular lands, so far as it goes, than the absolute title to the lands as definitely located? Is that right, such as it is, completed and finished as to the lands it is to affect, or unfinished? In what respect unfinished?

It seems to us the court regards such rights, when directly involved in the case before it, as equally entitled to consideration with other rights, and that Congress did not intend in 1870 to grant lands which at definite location in 1873–1882 were affected by such rights under the first grant.

As a new question, Should not the court hold that withdrawal and general route map constitute definite fixing and vest title, subject to be divested by new map of company or subsequent Congressional action, but good otherwise, especially as between the grantee and the Government?

We might go even farther than this. A glance at the evolution of the doctrine that a grant may be *in præsenti* and yet not vest an absolute title in any land until subsequent action on the part of the grantee, is interesting in connection with determining what further development of the principle can be made without inconsistency and what effect a general route map and withdrawal can properly be given.

In the first case, that of *Rutherford* v. *Greene* (2 Wheat., 196), above referred to, the State of North Carolina had granted to General Greene 25,000 acres of land within the limits of a tract reserved for the use of the Army, to be laid off by commissioners appointed for that purpose. The suit turned on the title of General Greene and the date it took effect. The court, Chief Justice Marshall delivering the opinion, held the grant to be *in præsenti*, that the general gift of 25,000 acres became by the survey a particular gift of the

quantity contained in the survey, and concluded their opinion by saying the court was unanimously of opinion that the act of 1782 vested a title in General Greene, and that the survey gave precision to that title and attached it to the land surveyed.

The next case is *Lessieur* v. *Price* (12 How., 59). The act of Congress for the admission of Missouri into the Union provided "that four entire sections of land be, and the same are hereby, granted to said State for the purpose of fixing the seat of government thereon, which said sections shall, under the direction of the legislature of said State, be located as near as may be in one body, at any time, in such townships and ranges as the legislature aforesaid may select on any of the public lands of the United States." The court said:

> The land was granted by the act of 1820; it was a *present grant*, wanting identity to make it perfect, and the legislature was vested with full power to select and locate the land; and we need only here say what was substantially said by this court in the case of *Rutherford* v. *Green's Heirs* (2 Wheat., 196), that the act of 1820 vested a title in the State of Missouri of four sections, and that the selection made by the State legislature pursuant to the act of Congress, and the notice given of such location to the surveyor-general and the register of the local district where the land lay, *gave precision to the title* and attached to it the land selected.

In *Rice* v. *Railroad Company* (1 Black, 358–376) the court seems to think that the words "there shall be and

is hereby" granted are sufficient to constitute a grant *in præsenti*. The case, however, does not turn on that point. By the fourth section of the granting act it was provided—

> That the lands hereby granted to the said Territory shall be disposed of by said Territory only in the manner following—that is to say, no title shall vest in the said Territory of Minnesota, nor shall any patent issue for any part of the lands hereinbefore mentioned, until a continuous length of twenty miles of said road shall be completed through the lands hereby granted.

No road was built. Indeed, the granting act was repealed before the line had been surveyed and before the company had done anything more than to organize at the time and in the manner provided. The action brought by Rice in trespass was therefore, of course, sustained by this court. The granting act did not provide for any general route map.

In *Railroad Company* v. *Fremont County* (9 Wall., 89, 94), we first find the word "float" used in connection with a railroad grant. The question was whether certain land passed to the State under a swamp-land grant or whether it passed under a subsequent grant to aid in the construction of railroads. The language of exception in the railroad grant is held to exclude it from passing under that act. The court, however, takes occasion to use the following language:

> But there is still, if possible, a more decisive answer to the title set up by the defendants. Until the line of the railroad was *definitely fixed*

> *upon the ground*, there could be no certainty as to the particular sections of lands falling within the grant, nor could the title to any particular section on the line of the road vest in the company. The grant was in the nature of a float until this line was permanently fixed.

No general route map was provided *for* by the granting act.

Railroad Company v. *Smith* (9 Wall., 95) is a similar case, and relates to a controversy arising under the same acts of Congress.

The court says:

> The grants of lands by Congress to the States in aid of railroads have generally been made with reference to the lands through which the roads were to pass, and, as the line of the road had to be *located* after the grant was made, it has been usual in the acts making the grant to describe them as alternate sections of odd numbers within a certain limit on each side of the road when it should be *located*.
>
> This, of course, left it to be determined by the location of the road what precise lands were granted. So far as this uncertainty in the grant was concerned, it was one which might remain for a considerable time, but which was capable of being made certain, and *was* made certain, by the *location* of the road.

And further states:

> Congress has here given a criterion, apparently not difficult of application, by which to determine what was granted, to wit, such legal subdivisions of the public lands, the greater part

> of which were so far swamp and overflowed as to be too wet for cultivation. Now, here is *a present grant* by Congress of certain lands to the State within which they lie, but it is by a description which requires something more than a mere reference to their ownerships, ranges, and sections to identify them as coming within it. In this respect it is precisely like the railroad grants, which only became certain by the *location* of the road. In fact, in this regard the swamp-land grant was the more specific, for all the lands of that description were granted, and they have remained so granted ever since, while no particular land was described by the railroad grant, which was a *float*, to be determined by the choice of the line of the road in future.

The court in both cases held that the lands passed under the swamp-land grant and were excepted from the grant to the railroad.

In *Schulenberg* v. *Harriman* (21 Wall., 44), where grants were made to the State of Wisconsin to aid in the construction of railroads, the defendant, as agent of the State, took possession of certain timber which had been removed from the land. Plaintiff thereupon brought an action of replevin. The railroad had not been constructed, and the granting act provided that within a certain time (which had elapsed) the lands should revert to the grantor if road was not completed. It contained the usual language of present grant and excepted lands sold by the United States or to which preemption claims had attached at date when road was "definitely fixed." The route had been surveyed and

a map filed. No action having been taken by the grantor looking to a forfeiture, the State was held to have title in trust for the purposes enumerated in the granting act. The cases above mentioned were referred to by the court, which said (p. 60), Mr. Justice Field delivering the opinion:

> That the act of Congress of June 3, 1856, *passed a present interest* in the lands designated there can be no doubt. The language used imports a present grant and admits of no other meaning. The language of the first section is "*that there be, and is hereby, granted* to the State of Wisconsin" the lands specified. The third section declares "that the said lands *hereby granted* to said State shall be subject to *the disposal* of the legislature thereof;" and the fourth section provides in what manner sales shall be made, and enacts if the road be not completed within ten years "no further sales shall be made, and the lands unsold shall *revert* to the United States." The power of disposal and the provision for the lands reverting both imply what the first section in terms declares, that a grant is made, that is, that the title is transferred to the State. It is true that the *route of the railroad*, for the construction of which the grant was made, *was yet to be designated, and until such designation the title did not attach to any specific tracts of land.* The title passed to the sections to be afterwards located; *when the route was fixed their location became certain*, and the title, which was previously imperfect, acquired precision and became attached to the land.

No general route map was required.

In *Leavenworth, etc., R. R.* v. *United States* (92 U. S., 733) it was held that where the right of an Indian tribe to the possession and use of certain lands as long as it may choose to occupy the same is assured by treaty, a grant of them by Congress to aid in building a railroad violates an express stipulation, and a grant in general terms of "land" can not be construed to embrace them.

The original Indian treaty was made in 1825, but by a treaty of 1865 the Indians conveyed certain of their lands to the United States. This treaty was proclaimed in 1867.

The railroad granting act was in 1863. In 1871 an act was passed by Congress to enable the grantee to relocate a portion of its road, and in the same year the governor certified that the road had been constructed and equipped as required by the act of Congress. The lands were then listed to the State, which thereupon issued to the appellant patents for those involved in the bill of complaint.

Referring to the grant the court said:

> It creates an immediate interest, and does not indicate a purpose to give in future. "There be and is hereby granted" are words of absolute donation, and import a grant *in præsenti.* This court has held that they can have no other meaning, and the land department on this interpretation of them has uniformly administered every previous similar grant. (*Railroad Company* v. *Smith*, 9 Wall., 95; *Schulenberg* v. *Harriman*, 21 id., 60; 1 Lester, 513; 8 Opin., 257;

11 id., 47.) They vest a present title in the State of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it and attach it to any particular tract. The grant then became certain, and by relation has the same effect upon the selected parcels as if it had specifically described them. In other words, the grant was a float until the line of the road should be definitely fixed.

And further:

> We have before said that the grant itself was *in præsenti*, and covered all the odd sections which should appear, on the location of the road, to have been within the grant when it was made. The right to them did not, however, depend on such location, but attached at once on the making of the grant. It is true they could not be identified until the line of the road was marked out on the ground; but, as soon as this was done, it was easy to find them.

The Indian lands were also held to come within the proviso to the granting act that any and all lands heretofore reserved to the United States are excepted from the grant, and that they subsequently became a part of the public domain was held to be immaterial.

None of the acts considered in the cases above mentioned provided for the filing of a map of general route.

The case of *Missouri, Kansas and Texas Railway Company* v. *Kansas Pacific Railway Company* (97 U. S., 491) considers the grant to the railroad then known as the Kansas Pacific, which provided for the filing of

such a map. But the effect of filing it was not even mentioned in the opinion. The suit was between two railroads. The court held that the rights of the railroad companies were determined by the dates of their respective grants. In so doing it took occasion to say, referring to the grant to the M., K. & T. Ry. Co. (which did *not* require a general route map), that—

> The act of July 1, 1862, passed to the company a present interest in the lands to be designated within the limits there specified. Its language is, "that there be and is hereby granted" to it the odd sections mentioned—words which import a grant *in præsenti* and not one *in futuro*, or the promise of a grant. Similar terms in other acts of Congress granting lands have uniformly received this interpretation, unless accompanied with clauses restraining their operation. They were so interpreted in *Schulenberg* v. *Harriman*, after full consideration of previous adjudications on their import; and the ruling there was followed in *Leavenworth, Lawrence and Galveston Railroad Co.* v. *United States* (92 U. S., 733). It is true that the route of the road, in this case as in those cases, to aid in the construction of which the act was passed, was to be afterwards designated; and until designated the title could not attach to any specific tracts. The grant was of sections to be afterwards located, and their location depended upon the route to be established; when that was settled, the location became certain, and the title that was previously imperfect acquired precision and attached to the lands

In *Railroad Company* v. *Baldwin* (103 U. S., 426) it was held that the grant to the St. Joseph and Denver City Railroad Company of land "to the extent of 100 feet in width on each side of said road where it may pass through the public domain," without reservation or exception, is absolute and *in præsenti*, and a party subsequently acquiring a parcel of such lands takes it subject to that right. The plaintiff's right to the land attached prior to the definite location, but subsequent to the date of the grant. The court said:

> The act is a present grant, except so far as its immediate operation is affected by the limitations mentioned. "There is hereby granted" are the words used, and they import an immediate transfer of interest, so that when the route is definitely fixed the title attaches from the date of the act to the sections, except such as are taken from its operation by the clauses mentioned. This is the construction given by this court to similar language in other acts of Congress. (*Missouri, Kansas and Texas Railway Co.* v. *Kansas Pacific Railway Co.*, 97 U. S., 491; *Leavenworth, Lawrence and Galveston Railroad Co.* v. *United States*, 92 id., 733.)
>
> But the grant of the right of way by the sixth section contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the Government with respect to the public lands which would call for any qualification of the terms. Those lands would not

> be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby.

And it held the plaintiff not entitled to damages from the railroad company for entering his land and appropriating the right of way. No general route map was required.

In *Grinnell* v. *Railroad Company* (103 U. S., 739), subsequent settlers sought to acquire rights to the land on the theory that the railroad title had been divested by a change in location of a part of the road, such change being under authority of Congress. After the change the lands in question fell without the original place limits. The court's decision was adverse to the claims of the settlers. It said:

> The grant under the act of 1856 was, as has been often said, a grant *in praesenti*, and though exactly what this means has been the subject of much controversy, we think its ascertainment is not difficult. The only doubtful element of the problem is the location of the road, which, by the terms of these grants, is necessary to identify the sections granted on each side of it. *Whenever that is done so that a surveyor or the officers of the Land Department can protract the line of the route on the maps of the public lands within the limit of the grants, the identity of the lands granted is mathematically ascertained, and the title relates back to the date of the grant.*
>
> So far as lands are found in place when this is done, not coming within the exceptions as

> sold or held under preemption, the title, or at least the right to this land in place, is at once vested in the State or in the company to which the State has granted it, and the means of ascertaining precisely what lands have passed by the grant is to be found in the map of the line of the road, which is filed in the General Land Office under provisions of the statute.

The granting act did not provide for any map of general route, but contained the usual provision making exceptions from the grant when the route was "definitely fixed."

In *Van Wyck* v. *Knevals* (106 U. S., 360), Mr. Justice Field, delivering the opinion of the court, said:

> The principal question for determination in this case is, When does the grant made to Kansas by the act of Congress of July 23, 1866, c.212, for the use and benefit of the St. Joseph and Denver Railroad Company in the construction of a railroad from Elwood, in that State, to its junction with the Union Pacific Railroad, or a branch thereof, to take effect so as to cut off the right of preemption from subsequent settlers on the land? The grant is similar in its main features to numerous other grants of land made by Congress in aid of railroads, and contains the same limitations, or, rather, exceptions to it.

There was no general route map provided for, and the court held as follows:

> The grant was one *in praesenti*, except as its operation is affected by that condition; that is, it imports the transfer, *subject to the limitations*

mentioned, of a present interest in the lands designated. The difficulty in immediately giving full operation to it arises from the fact that the sections designated as granted are incapable of identification until the route of the road is "definitely fixed." When that route is thus established the grant takes effect upon the sections by relation as of the date of the act of Congress. In that sense we say that the grant is one *in praesenti. It cuts off all claims, other than those mentioned, to any portion of the lands from the date of the act, and passes the title as fully as though the sections had then been capable of identification.*

St. Paul v. *Winona Railroad* (112 U. S., 720) is a contest between two railroad companies. The decision goes no further than to hold that priority of grant, and not priority of location, gives priority of title, and that lands falling within conflicting limits of grants to different companies under the same granting act are taken by the companies in equal undivided moieties. No general route map was mentioned.

The granting act in *Kansas Pacific* v. *Dunmeyer* (113 U. S., 629) provided for a general route map. It contained the usual exceptions as of the date of definite location, however, and the court simply held that the subsequent failure to comply with the acts of Congress concerning residence, etc., by a settler who went on the land prior to definite location and remained until after it does not cause the land to revert to the railroad company and become a part of the grant.

Walden v. *Knevals* (114 U. S., 373) was a case similar in some respects to *Van Wyck* v. *Knevals* (106 U. S., 360). The determinative question was as to the time when the road became "definitely fixed," and the court held that it was so fixed when the map of the route adopted by the company was filed with the Secretary of the Interior. A settler who initiated his claim subsequent thereto had a right inferior to that of the company. There was no general route map provided for.

In *Wisconsin Central Railroad Co.* v. *Price County* (133 U. S., 496) the court held that lands within the place limits of the plaintiff were subject to taxation by the State, notwithstanding the fact that patents had not yet been issued by the Government, but that indemnity lands which had been selected by the company and such selection not yet approved by the Secretary of the Interior were not subject to taxation by the State.

Mr. Justice Field, delivering the opinion of the court, in discussing the question when the title of the railroad company became such as to subject its lands to taxation, said:

> The title conferred by the grant was necessarily an imperfect one, because until the lands were identified by the definite location of the road it could not be known what specific lands would be embraced in the sections named. The grant was, therefore, until such location, a float. But when the route of the road was definitely fixed the sections granted became

susceptible of identification and the title attached to them and took effect as of the date of the grant, so as to cut off all intervening claims. (*Schulenberg* v. *Harriman*, 21 Wall., 44, 60; *Leavenworth, etc., Railroad* v. *United States*, 92 U. S., 733, 741; *Missouri, Kansas and Texas Railroad Co.* v. *Kansas Pacific Railway Co.*, 97 U. S., 491, 496; *Railway Company* v. *Baldwin*, 103 U S., 426, 429.) The road having been built as early as June, 1877, and supplied, as required, with the appurtenances specified, the company was entitled to have the restrictions upon the use of the land released. It had then to the eleven 40-acre parcels which were capable of identification an indefeasible right or title; it matters not which term be used. The subsequent issue of the patents by the United States was not essential to the right of the company to those parcels, although in many respects they would have been of great service to it.

The granting act did not provide for any general route map.

In the case of *St. Paul and Pacific* v. *Northern Pacific* (139 U. S., 1), it appeared that the grants to the St. Paul and Pacific, so far as they formed the subject of that controversy, were subsequent in date to the act under which the Northern Pacific claimed, and that, therefore, they came under the well-settled rule that where different grants cover the same premises the elder takes the title.

Mr. Justice Field, speaking for the court, said:

> The language of the statute is "that there be, and hereby is, granted" to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future.
>
> The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in praesenti;* that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route.
>
> This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion. (*Schulenberg* v. *Harriman*, 21 Wall., 44, 60; *Leavenworth, Lawrence, etc., Railroad Co.* v. *United States*, 92 U. S., 733; *Missouri, Kansas, etc., Railway Co.* v *Kansas Pacific Railway Co.*, 97 U. S., 491; *Railroad Co.* v. *Baldwin*, 103 U. S., 426.) The terms of present grant are in some cases qualified by other portions of the granting act, as in the case of *Rice* v. *Railroad Company* (1 Black, 358); but unless qualified they are to receive the interpretation mentioned.

It was contended that there were certain qualifications in the Northern Pacific grant which excepted it from the general rule, but the court held otherwise.

In *Deseret Salt Co.* v. *Tarpey* (142 U. S., 245) the controlling question under discussion was whether upon filing and acceptance of map of definite location a lessee of the company could maintain an action for the premises. It was contended that the grant was only a promise of title when the work was completed and that until then possession of the lands can not be claimed. No general route map was provided for. The court, referring to *Rutherford* v. *Green*, *Schulenberg* v. *Harriman*, *Leavenworth*, *etc.*, *Railroad* v. *United States*, and *Wisconsin Central* v. *Price County*, above mentioned, said:

> The terms used in the granting clause of the act of Congress and the interpretation thus given to them exclude the idea that they are to be treated as words of contract or promise rather than, as they naturally import, as words indicating an immediate transfer of interest. The title transferred is a legal title as distinguished from an equitable or inchoate interest.

And held that:

> From the view of the interest conveyed by the grant which we have expressed we are satisfied that the company could maintain an action for the possession of the premises in controversy and that its lessee, the plaintiff herein, was possessed of the same right. The judgment must therefore be affirmed.

In *Sioux City, etc., Land Co.*, v. *Griffey* (143 U. S., 32), the plaintiff, claiming under a grant to the State to aid in the construction of a railroad, sought to recover a tract claimed by the defendant under a patent from the United States based on a preemption claim initiated prior to definite location. The plaintiff contested the bona fides of the preemption settlement. No general route map was required. The court adhered to the now well settled doctrine that while the grant is *in praesenti*, tracts subject to the claims mentioned in the language of exception as of date of definite location do not pass to the company, and denied to the plaintiff the right to go into the bona fide character of the claim or settlement made prior to definite location.

In *United States* v. *Southern Pacific* (146 U. S., 570), where certain tracts covered by the grant to the Atlantic and Pacific Company, as identified by its map of definite location, fell also within a subsequent grant to the Southern Pacific, it was held that the prior grant determined the title. The court speaks of the map of definite location as identifying the tracts which were to pass *in praesenti* under and as of the date of the grant. The granting act required no map of general route. Had it done so, and nothing further been done after filing it, there seems to us to be no reason which would prevent the court from holding, in accordance with this decision, that the map of general route identified the lands sufficiently for the purposes of the grant, and that in every other instance than those claims and the like which are expressly excepted from the grant as of the date of definite

location, the title of the railroad becomes attached to particular lands upon filing the map of general route. The general route map identifies the land. That the route may be subsequently changed is not important. If it should be so changed that lands falling within it would not fall within the new route, this need not be fatal to the title already passed to the company. (*Grinnell* v. *Railroad, supra.*) It is but just to the railroad to hold that it gets some rights by filing a general route map when it is required by statute to file one. It publishes to the world the probable line of its route. Are others to profit by that information at the expense of the company? Certainly not With certain enumerated exceptions as of date of definite location it seems to us title of company then passes *in præsenti* as of date of grant. (*Railroad Company* v. *Baldwin, supra.*) The company acquires no more of a title to its right of way than to its place lands.

We do not ask, however, and it is not necessary that the court go so far in this case. We simply contend that upon filing the general route map the railroad company acquires to the lands thus identified a title good as to all the world except the *power* of Congress as of the date of the grant, with the certain exceptions named in the clause of reservation and there expressly provided to take effect or be ascertained upon definite location. Certainly the general route map must be given some effect. What other effect would it have if it has not that here claimed for it?

When the grant of 1870 was definitely located the grant of 1864 was not a float, but an effective grant of particular lands.

These cases show how the doctrine has been developing and gaining momentum since its inception. In the first cases the lands had only to be located and title immediately passed *in praesenti* as of date of grant. The grant was referred to as a "float." In a sense it was one. Its location served to give it precision and had no greater effect.

Then came an application of the general doctrine to specific railroad grants. The granting acts did not require any map of general route. *There was but one fixing of the route.* The map filed came to be called a map of *definite location*, that is, a map which accomplished the "definite fixing," and as the grants provided for excepting certain tracts at the date when the road became definitely fixed, the court came to refer to the grants as being *in praesenti*, but not attaching to any lands for any purpose until definite location. This was only in general language, however, used in controversies with people whose tracts were undoubtedly excepted as of the date of definite location under the express provisions of a clause taking them out of the grant as of that date. The grant was to be absolutely *in praesenti* as to everything else and for every other purpose. In *Railroad Company* v. *Baldwin* (*supra*) there was a grant of a right of way to a railroad company without any such exceptions as of the date of definite location. A settler's rights had attached prior to definite location, but the court held the

grant to be one absolutely *in praesenti*, and, notwithstanding the claims of the settler, held the railroad to have the superior right.

In the earlier cases, the words "definitely located" or "definitely fixed" are found. They did not and do not mean the technical definite location provided for in subsequent grants. They were not used in opposition to maps of general route, for there were none. They meant simply a location more definite than the grant itself contained. In a sense the road was located by the grant. Its termini were usually fixed thereby. There had to be a location of some kind beyond that contained in the grant, and it was referred to as being "definite" to distinguish it from the less definite location contained in the grant.

This was the status of the decisions when a grant providing for a map of general route came up for consideration. The effect of filing such a map, however, did not enter into the case and the court very naturally continued to refer to definite location as the time when title passed to company. It had in mind the definite location it had previously considered. That location was no more *definite* than is that now secured under a general route map. The court has held that the definite location may be changed; that the road need not be constructed along that location, and still a settler can not complain. (*Grinnell* v. *Railroad Company*, *supra*.) A definite location, then, did not at the time convey to the court or to anyone else the idea of a fixed and unchangeable thing. It meant only such a location as would attach the grant to *some* definite

lands, which the general language of the granting act did not. The general route map serves that same purpose. It fills the office which the court in the beginning ascribed to an act which it, for lack of any better term, called "definite location."

The effect to be given to the filing of a general route map now becomes important, and it seems to us the court might without inconsistency hold that, as to all things (other than those expressly covered by the proviso saying that they shall attach if they have been initiated prior to definite location) the grant is *in præsenti* and attaches from its date, only requiring a fixing to give it a degree of certainty, and that upon such fixing, which occurs when general route map is filed, title of company becomes vested and can be divested only by act of the grantor.

The case of *Menotti* v. *Dillon* (167 U. S., 703) would not be inconsistent with a holding as suggested. There the court was of opinion that Congress intended an act of repose to grant the lands, notwithstanding they fell within the place limits of the first grant, and that Congress had power to do this. That case distinctly holds that the order of withdrawal on general route "took these lands out of the public domain as between the railroad company and individuals, but they remained public lands under the full control of Congress." The court say:

> The right acquired, in virtue of the act making the grant and of the accepted map of its general route, was to earn such of the lands, within the extension lines of *that route*, as were *not* sold,

reserved, or disposed of, or to which no preemption or homestead claim had attached, at the time of the definite location of its road.

Most of the cases referred to above were cited in the case of *United States* v. *Oregon, etc., Railroad Company* (176 U. S., 28, 42), and they are sufficient to illustrate the growth of the doctrine that a grant is and must be a float until it is attached to particular land. We now contend that for some purposes the grant attaches to particular lands when the general route map is filed, and that for others it remains a float until definite location, because the grant itself so provides.

To recapitulate, then, a careful analysis of the decisions above referred to shows:

1. That the grants are absolutely *in præsenti* as of date of grant, with this exception, that certain lands covered by certain claims or rights at the definite location are excepted expressly as of that date.

2. That any fixing of route more definite than that contained in the grant was originally called a "definite location" or "definite fixing." Of course, something of that sort was physically necessary to attach the grant to any specific tract.

3. When later grants came along providing for both "general route" and "definite location," the court continued to speak of definite location as the time when the grant ceased to be *a float*. In the particular instances, it had under consideration lands which the excepting clause excepted *as of the date of definite location.*

4. Aside from such excepting clause, the general route map performs the same office as that at first attributed to a thing called "definite fixing" or "definitely locating," or simply "locating."

5. We now have a case where the filing of the general route map becomes important, and we do no more than ask the court to adhere to the doctrine it has been announcing and go one step further and hold that upon filing map of general route the railroad acquires a claim or right to the land, good as against all the world other than certain persons permitted by the excepting clause of the act to come in up to a later date specified, and except generally as to the power of Congress by express legislation to dispose of the lands.

The rights granted and vested under the act of 1864 were forfeited in such a way as to benefit the Government and not to cause the enlargement of other grants.

The forfeiture act of 1890 provides that it shall not be construed to enlarge the area of land originally covered by any grant, or to confer any right upon any State, corporation, or person to lands which were excepted from such grant, and that the moiety of lands granted for a main and branch line, when but one is completed, inure to the benefit of the completed line. There can be no doubt that by this act the Northern Pacific Company lost its rights under the grant of 1864, or that up to that time it had rights in and to particular lands under that grant which, if it had in 1889 with governmental acquiescence proceeded to

build east from Portland, would have given it the lands in question by an absolute title. The grant of 1864 was *in præsenti* and located upon particular lands. While homestead occupants were not forbidden to settle upon these, yet the grant was certain after 1870, and title fully passed as against all those not expressly permitted by the granting act to come in before definite location. As between the Government and company and other companies it was a finally located grant of lands. Does not the contention of the other side lead to an enlargement of the area of the grant of 1870 by the act of 1890? This is forbidden.

The actual Oregon and California decision and a hypothetical remark about the Perham map and the power of Congress.

7. Owing to the nature of the Perham map (which was explained and discussed in the case of *U. S.* v. *Oregon & Cal. R. Co.* (176 U. S., 28, and in effect held to be worthless in *Doherty* v. *N. Pac. R. Co.*, 177 U. S., 421), and the absence of a withdrawal of lands, the lands involved in the Oregon case were naturally held to pass to the Oregon Company. But the decision in that case is accompanied by a remark upon a mere hypothetical case which should not, we respectfully submit, be held to overrule well-considered decisions in other cases. Had the Perham map been actually a map of general route, which the court did not consider it, then, following the logic of these other decisions, while it would not have precluded the *power* of Congress to grant the lands, yet we are led to four obvious consequences.

The first is that the language of the Oregon grant should be and would have been carefully examined in search of the Congressional intent to grant or not the lands there in question. This the court did not feel it necessary to do in the other case. It devoted four or five pages to establishing that the lands *could*, notwithstanding the hypothetical general route map, be granted by Congress; but the intent to grant them is not examined into or even mentioned. The court merely remarks that "being within the limits of the Oregon grant" they were granted, and speaks of their not being "appropriated." But, on the hypothetical case, the mere exterior limits or boundary of the grant can not be treated as conclusive without overruling *No. Pac. R. R. Co.* v. *Musser-Sauntry Co.* (168 U. S., 604, 608).

The Oregon grant excepted lands within the limits that were "reserved." In the case cited it is clearly held that lands withdrawn under a good map of general route are "reserved" and do not pass under such a grant, and the *Buttz case* (119 U. S., 55) holds that such a map, by operation of law, withdraws and thus reserves them. The Buttz case is not overruled, but only held not to exclude the *power* of Congress to grant withdrawn lands.

The second point is that, aside from the express exception of reserved lands, there is nothing in the Oregon grant to give it the unusual intent of granting to the second grantee lands withdrawn by or under a good map of general route for a prior grantee. There is nothing peculiar in the circumstances or facts to in-

dicate such an intent. Consequently, to hold, in the hypothetical case of a good map of general route, that such an intent existed would be to overrule *St. Paul and Pac. R. R. Co.* v. *No. Pac. R. R. Co.* (139 U. S., 1, 17), where the court say:

> Besides, the withdrawal made by the Secretary of the Interior of lands within the 40-mile limit, on the 13th of August, 1870, preserved the lands for the benefit of the Northern Pacific Railroad from the operation of any subsequent grants to other companies not specifically declared to cover the premises. The Northern Pacific act directed that the President should cause the lands to be surveyed 40 miles in width on both sides of the entire line of the road, after the general route should be fixed, and as fast as might be required by the construction of the road, and provided that the odd sections of lands granted should not be liable to sale, entry, or preemption before or after they were surveyed except by the company. They were therefore excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unencumbered until the completion and acceptance of the road.
>
> * * * * *
>
> After such withdrawal no interest in the lands granted can be acquired against the rights of the company except by special legislative declaration, nor, indeed, in the absence of its announcement, after the general route is fixed.

The court has since held that homestead occupants up to definite location were recognized by the granting act as entitled to take the lands they "occupied," especially in view of an act of 1880 concerning settlers on railroad lands, and in view of the unsurveyed condition of the vast area through which the Northern Pacific was to pass, but that is a wholly different question and between very different parties. That was a mere construction of the excepting clause in the grant which expressly includes "lands occupied by homestead settlers."

The third proposition, relating to the hypothetical case of a good Perham map and withdrawal in 1865, is that the court would, in allowing the Oregon road to get a grant at Portland by a grant of 1866, be overruling the general doctrine, so well settled, that a doubt is fatal to the grantee. "Silence is negation and a doubt is fatal to the claim." *Fertilizing Co.* v. *Hyde Park*, 97 U. S., 659; *Pearsall* v. *Great Northern Rwy. Co.*, 161 U. S., 1; *Atlantic and Pacific R. R. Co.* v. *Mingus*, 165 U. S., 429; *Leavenworth R. R.* v. *U. S.*, 92 U. S., 740; *Dubuque and Pac. R. R. Co.* v. *Litchfield*, 23 How., 66, 88.

The fourth proposition is that only "public lands" are taken by a railroad grant (*U. S.* v. *South. Pac.*, 146 U. S., 570, 606), and as the court does not overrule the Buttz case, a hypothetical good Perham map of general route would withdraw the lands; that is, make them cease to be public lands, although, nevertheless, expressly permitted to be taken up by homestead

occupants, etc. This is one reason why there must be express and exceptional language to grant withdrawn lands.

This court, in giving to the Oregon case all the consideration the actual facts justified, neither intended to overrule nor even considered the propriety of overruling any of these four doctrines directly involved and laid down in other cases, not once but repeatedly.

The hypothesis of the Perham map being a good map of general route, is made incidentally and only in connection with the *power* of Congress. There is no evidence that it received any further consideration, and we have a right to believe that the court considered the map, as it soon after held it to be, insufficient. The intent of Congress in the grant of 1866 is not *discussed at all*, still less considered in all possible phases of the hypothetical case.

We say, therefore, that the actual decision in the actual case before the court may be regarded as authority, but that there is no reason for regarding the hypothesis as having any bearing on the present controversy. The actual case certainly has none.

To treat an incidental hypothesis which is introduced *arguendo* in discussing the power of Congress, as introduced for all purposes, not only in that but other cases, and thereby make the court inferentially overrule doctrines it had settled and was not considering, is far from the proper employment of previous decisions as authority. No better road can be taken to the establishment of bad law. The hypothesis was considered

only in the connection in which it was spoken of—the power of Congress. But, fortunately, we are now before the same tribunal which decided that case, and the question is not what was said there about a supposition made incidentally, but what is the law which should be applied here to a different set of facts. If anything was "too broadly" expressed there, this court will not hesitate to limit it, as it did the expressions in the Buttz case. If any expressions were used which can be understood as overruling four of the best settled doctrines of the court, then the court will say, as the fact was, that it had no such intention, and that the doctrines are sound, whether it had it or not.

In the matter of the Northern Pacific Railroad Company (31 Land Decisions, p. 34) the Secretary of the Interior says:

> Applying this ruling to the lands in question, they were at the time of the grant to the Northern Pacific Railroad Company included within an existing and lawful withdrawal made in aid of a prior grant and were therefore not subject to sale or other disposition under general laws. They were not "public lands" within the accepted meaning of those words (*Barker* v. *Harvey*, 181 U. S., 481, 490) and were not within the terms of the grant to the Northern Pacific Railroad Company, which was of "every alternate section of *public land*." While the decision in the case of *United States* v. *Oregon and California Railroad Company* (176 U. S., 28), cited by appellant, gives color to appellant's contention, it must be remembered that *in that*

case the lands in controversy *were not reserved* under the prior grant or at all until after the date of the later grant under which they were held to have passed. They *were public lands* at the time of the later grant which was held to have embraced them. The case of *Bardon* v. *Northern Pacific R. R. Co.*, *supra* (145 U. S., 535) and kindred cases were not referred to in the opinion of the court, and it can not be presumed that by any general discussion upon an immaterial point the court intended to overrule the Bardon and kindred cases.

General remarks.

We say, then, in conclusion—

1. The intent of the resolution of 1870 to grant the lands in question is the point to be decided. That intent is to be ascertained from the language of the resolution, read in the light of the circumstances existing and contemplated as to come into existence, when the resolution was passed.

2. The language differs from that of the grant to the Oregon and California Company in that it concerns only lands absolutely free from rights and claims at the time of definite location.

3. The language differs in that it is based upon, connected with, and supplements the grant of 1864 to the same grantee for one road.

4. The subject-matter differs in that it includes a continuous road to be constructed by the same grantee via a given point, and not a rival road to such a point.

5. The circumstances differ in that there was no map of general route in 1866–1869 in the other case, but only the worthless Perham map, and in the present case, before the definite location, there was a good map of general route and a requested withdrawal of the lands duly made.

That it is proposed here not to permit a diligent rival to acquire lands that were free public lands when it definitely located, but the same grantee to acquire lands under a second grant by alleging his failure to perform his contract under the first, although it appears in many ways that his second grant was not intended to cover the lands. This is not equitable or reasonable, and the court should exert its ingenuity, if needed, to prevent such a result.

That the practical view of the Congressional intent shows that a point on the Columbia River north of Portland, or Portland itself, was, for commercial and business reasons, what Congress intended as the terminus of the first road and point from which it was to go north; that subsequent proceedings show that the company so understood; that the company in 1870 by a good map selected the point; that there has never been a suggestion of any other point, except Portland itself, as contemplated by the company or the Government from 1864 to this time, and that the lands in question lie within any map that could have been made after 1870 of the grant of 1864. That Congress knew this and that consequently the court knows the lands were not intended to be granted by the resolution of

1870 for the continuation of the road to Puget Sound. Knowing this, the court is not justified in reasoning from other cases to a conclusion which defeats the obvious intent of the law and the parties to this transaction, but should in some way carry out that intent.

That the map of 1870, when the resolution of 1870 passed, was expected by Congress to be filed and to fix the point at or near Portland, as between the only possible alternative points.

The company should not be permitted at this late day to get these lands by alleging that it might have chosen one of the other points, which would slightly vary the boundary of the first grant, but would not withdraw these lands from it. It got all the benefit of its selection and should not now be permitted to injure the Government and settlers by alleging that it might possibly have changed its mind, when it did not do so and ceased to have a right to do so.

A gives B 40 acres of his farm, B to provisionally select them, with the right within a year to change the boundary and get full title, forfeitable for nonpayment of the price.

He then tells B he may have on like terms land lying north of his first land and beginning where that ends. B provisionally fixes the 40 acres, makes no change within the year, and forfeits his rights as to them. Would he be permitted to say that, as the second grant was to begin at the north end of the first and no final boundary was fixed or title passed to them, he could not find any such boundary, and therefore

should take all the 40 acres as part of his second grant?

That it may well be held that the second granting act fixed Portland as the end of the road from Puget Sound and consequently the point on the continuous road from which it was to go east, which, if not amounting to a definite location as against third parties, yet, as between the Government and the company, sufficiently shows that these lands were not intended to be within the limits of the second grant.

The like might be said, substituting Fort Vancouver for Portland.

That the *quantity* of lands we contend to be cut out of the second grant must have been intended to be cut out, and the court should seize upon some of the many reasons, including estoppel, for treating the lands in suit as a part of the quadrangle of lands intended to be cut out, rather than fail to do justice and equity between the parties, and to the settlers who are on the land and have made improvements in good faith, unless, of course, the court can point out a still more probable quadrangle as intended to be cut out. But that would be impossible.

That a moiety of the lands, at least, belongs to the Government, as in the case of a main and branch line only one of which was constructed before 1890.

Respectfully submitted.

CHARLES W. RUSSELL,
Special Assistant Attorney-General.

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JAMES H. McKE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 145.

THE UNITED STATES,

Petitioner,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY *and* THE NORTHERN PACIFIC RAILWAY COMPANY.

BRIEF FOR APPELLEES.

C. W. BUNN,
JAMES B. KERR,
Counsel for Appellees.

Supreme Court of the United States.

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THE UNITED STATES,

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THE NORTHERN PACIFIC RAILROAD COMPANY *and* THE NORTHERN PACIFIC RAILWAY COMPANY.

STATEMENT.

This suit was brought by the United States against the Northern Pacific Rail*road* Company and Northern Pacific Rail*way* Company to cancel patents issued by the United States to the Rail*road* Company to about 48,458 acres of land. The pat-

The question is whether the lands within the "Overlap" were appurtenant to the line from Portland to Puget Sound, and whether being so appurtenant they passed to the Railroad Company under the Joint Resolution of 1870. The Interior Department prior to July 18, 1895, uniformly held these lands to pass under the grant contained in the Joint Resolution, and under that ruling patented a large part of them (48,458.81 acres) to the Railroad Company. But on July 18, 1895, Secretary Smith, in *Spaulding v. N. P. Railroad Company*, 21 L. D. 57, reversed the established rule and held that they did not pass under the grant of 1870, because at the date of that grant they were reserved or appropriated under the earlier grant of 1864 to the same company (see also 23 L. D. 70). Since then lands have, under the rule of the *Spaulding Case*, been patented adversely to the Railroad Company to the extent of about eleven thousand acres.

It appears from the answer and exhibits A, B and C, attached thereto, that a large part of the lands patented to the Railroad Company have been sold to settlers (Transcript, pp. 29-31 and 62-71) who claim *under* the company's title. Such settlers as claim *adversely* to the company will probably be protected, however this case is decided, under the act of 1898 (30 Stat. 620).

The question being, whether these lands were on May 31, 1870, reserved or appropriated by virtue of the grant of July 2, 1864, or by virtue of any map filed or act taken under the grant, so that they did

not pass under it, it is to be noted that the *grant itself* did not reserve the lands.

The grant of the Act of 1864 (sec. 3) was of land to which

> "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office."

The *settled* construction of this grant is, that it did not reserve or appropriate any land, or take it out of the disposing power of Congress, until the line of road was *definitely* located by map filed as the Act requires. *Northern Pacific R. R. Co. v. Sanders*, 166 U. S. 620, 634, 636; *Menotti v. Dillon*, 167 U. S. 703, 720; *United States v. Oregon etc. R. Co.*, 176 U. S. 28, 43; *Nelson v. Northern Pacific Ry. Co.*, 188 U. S. 108, 119.

Therefore the inquiry is further narrowed to this: *Had the line Wallula to Portland been definitely located when the Joint Resolution of* 1870 *was passed?* Upon this question the facts are as follows:

On March 6, 1865, Josiah Perham, president of the Northern Pacific Railroad Company, transmitted to the Secretary of the Interior a sketch of the "general line" of the railroad. A copy of this map is Exhibit A (Transcript, volume "Exhibits"). It shows two lines commencing at Lake Superior running westerly and converging near the eastern boundary of the then territory of Dakota, and one

line extending west therefrom to a point in the territory of Washington near the Columbia guide meridian. From this point one line extends southwest along the valley of the Columbia river to a point near Portland thence north to Puget Sound, while another line extends from the point of divergence over the Cascade mountains joining with the first line on Puget Sound.

Upon receiving this map, the Secretary of the Interior transmitted the same, describing it as a map showing "The general line of the Northern Pacific Railroad," to the Commissioner of the General Land Office, with a recommendation that the lands be withdrawn along the line so delineated. The Commissioner of the General Land Office upon receiving the map and the Secretary's letter, addressed the Secretary under date of June 22, 1865, giving reasons why the map should not be accepted, specifying, among others, that it was so indefinite as to give no basis for any withdrawals, and that in other respects it was not in conformity with the existing rules and regulations. The letter of the Commissioner shows an endorsement to the effect that the Secretary sustains the Commissioner's refusal to approve the map. The records of the board of directors of the Northern Pacific Railroad Company from the date of its first meeting and until May 18, 1865, show no action with reference to locating the line of road and show no action conferring authority upon the president to locate the line. The powers of the president, as conferred by the by-laws, are set out in the agreed statement of facts and show no author-

ity in him to take such action. Except as above stated, the Interior Department has never taken any action under or relative to the map in question and has never made any withdrawals of land thereunder (Transcript, pp. 85-95).

On July 30, 1870, two maps of *general* route were transmitted to the Secretary, copies of which are Exhibits B and C (Transcript, volume "Exhibits"). One of these maps shows a line starting at the mouth of the Montreal river, on the boundary between Wisconsin and Michigan, and extending westerly over and across the states of Wisconsin and Minnesota, and the territories of Dakota and Montana to a point at the mouth of the Walla Walla river, in the territory of Washington. The other shows a line starting at the mouth of the Walla Walla river extending down the valley of the Columbia river to a point near Portland; thence northerly to a point on Puget Sound. These maps were, on August 13, 1870, by the Secretary transmitted to the Commissioner of the General Land Office with instructions to withdraw and hold reserved lands within twenty miles on each side of the route so designated (Transcript, pp. 95-104).

It will be noted that these *instructions* to withdraw on *general route* were issued nearly three months after the Joint Resolution of 1870 was passed; and that the map from Portland to Puget Sound and any withdrawal under the same were referable only to the *Joint Resolution, the Act of* 1864 *not authorizing that line.*

No portion of the line from Wallula to Portland

was ever definitely located (Transcript, p. 135).

On September 13, 1873, the Railroad Company filed, under the *Joint Resolution*, a map of *definite* location of the line from Tenino to Kalama, and on September 22, 1882, it *definitely* located the remainder of the Portland-Puget Sound line (Transcript, pp. 104-107). Maps of these definite locations were duly accepted by the Department and the lands appurtenant to them, including the lands in suit, were withdrawn from sale.

All the lands in suit are opposite to and within the place limits of the line covered by the Joint Resolution. They are also opposite to the unlocated and unconstructed line from Portland east described in the act of 1864 (Transcript, pp. 133-4).

The lands in suit were on May 31, 1870, when the Joint Resolution was passed, and also on the dates of definite location of the railroad opposite them, public lands to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, except as they may have been reserved or appropriated by the Act of July 2, 1864, or by the maps filed, and the acts of the company done, under that Act (Transcript, p. 134).

The railway from Portland to Puget Sound was duly completed as located and was accepted by the Government (Transcript, pp. 134-5).

The defendant Northern Pacific *Railway* Company has succeeded to all the rights of the defendant *Railroad* Company.

ARGUMENT.

We think all the questions presented in this case have been conclusively determined against appellant in *United States v. Oregon & California R. Co.*, 176 U. S. 28; and the Circuit Court so held (Transcript, pp. 144-148). The Circuit Court of Appeals certifies that the issues and facts in this case are identical with those in the *Oregon & California case*, except that the Northern Pacific Company is the grantee in both over-lapping grants (Transcript, p. 166). The certificate of that court is we think unusual in not stating or suggesting that the court had any doubt as to how the case ought to be decided.

The government will be driven to contend that the lands in suit were appropriated or reserved under the earlier grant of July 2, 1864, to the same company or by virtue of the maps filed or acts done in pursuance of that grant. As the grant itself did not make a reservation or appropriation of the lands, that must have been accomplished, if at all, by the filing of either the Perham map (March 6, 1865) or the general route map of July 30, 1870.

An examination of the case of *United States v. Oregon & California R. Co.*, will show that the decision controls this case. In that case it appeared that certain lands had been patented to the Oregon & California Railroad Company by the United States under the provisions of an Act of Congress approved July 25, 1866. By this Act Congress au-

thorized the California & Oregon Railroad Company, a California corporation, and such company as the legislature of Oregon should thereafter designate, to locate and construct a railroad between Portland, Oregon, and the Central Pacific Railroad in California, the Oregon company to construct that part of the line in Oregon beginning at Portland and running thence southerly by certain defined courses to the southern boundary of Oregon, where it was to connect with the part to be constructed in California by the California corporation. To aid in the construction of such railroad Congress made a grant of twenty sections per mile (ten on each side of the railroad line). The Act contained the usual exceptions of lands granted, sold, reserved or otherwise disposed of, and provided for a selection of indemnity in lieu of lands so disposed of. The legislature of Oregon designated the Oregon Central Railroad Company, of which the Oregon & California Railroad Company is the successor, to receive the grants made by the Act of July 25, 1866. On October 29, 1869, that company filed its map of definite location opposite to the lands in suit, and its map was accepted by the Secretary of the Interior January 29, 1870. It was contended that the lands in controversy, which had been patented to the Oregon & California Railroad Company, were reserved and appropriated for the benefit of the Northern Pacific Company under the Act of July 2, 1864, and by reason of the filing of the Perham map in 1865. The court considers at length the circumstances under which the

Perham map was filed, the indefinite character of the line shown thereon, and the action by the department when the map was filed; and, not passing upon the question whether the map constituted a valid location of the general route of the Northern Pacific Railroad, the opinion concedes, for the purposes of the argument, that the map might be regarded as a sufficient map of the "general route." The court then concludes that the effect of this map, even if valid as a map of general route, was not to appropriate the lands in controversy so that they would be excepted from the grant to the Oregon company, and held that the lands were not reserved when the Oregon company filed its map of definite location in 1869.

The Court, in *Doherty v. Northern Pacific Railway Company*, 177 U. S. 421, 432, affirming the decision of the Supreme Court of Wisconsin, holds that the Perham map was filed without authority and did not constitute a location even of the *general route* of the Northern Pacific Railroad, saying:

> "The views of the Supreme Court of Wisconsin on this subject may be properly quoted: 'On March 6, 1865, one Josiah Perham, then President of the Northern Pacific Railroad Company, filed with the Secretary of the Interior a map showing a proposed route of the proposed railroad. On this map appear two lines from a point in North Dakota to Lake Superior one ending at Duluth and one at the mouth of the Montreal River. The latter line is partially obliterated by a wavy red line through its whole length. It appears affirmatively that the president had no authority to make or file this map, and that the directors never author-

ized it; and further, that on June 22, 1865, the map was rejected by the Land Commissioner and by the Secretary of the Interior because it did not comply with the rules and regulations of the land department.'"

This decision was rendered upon the same state of facts presented in the case at bar with reference to the authority of President Perham to file the map in question.

The contention, that the lands in controversy were appropriated independently of the filing of any map, was urged upon the court in the *Oregon & California case*. Upon that point the Circuit Court of Appeals said (48 U. S. App. 1):

> "It is said that the grant contained in the act in and of itself, was 'an appropriation of the public lands.' Of what public lands? Of all the public lands situated within that immense belt through and along which the Northern Pacific Railroad Company was authorized to locate and built its road? Manifestly, if, prior to any designation by the grantee company of the line of road it was authorized to locate and build, the act making the grant, in and of itself, operated as an appropriation of any particular land, it operated as an appropriation of all public lands within the United States situated north of the 45th degree of latitude, and between the termini named in the act; for, prior to some designation of the route, it could not be known where the grantee company would find the most eligible railroad route, along which route it was authorized to build. We repeat, therefore, that prior to the designation of some route no distinction can be made between any of the public lands, not mineral, situated in the belt through and along which the Northern Pacific Railroad Company might have located and constructed its road. Is it

possible that all of that immense body of public land was, by the act of July 2, 1864, in and of itself, without any designation by the grantee company of the line of its road, withdrawn from subsequent grants? Undoubtedly not. In the case of *U. S. v. Southern Pac. R. Co.*, 146 U. S. 570, 13 Supt. Ct. 152, the supreme court said that the intent of congress in all railroad land grants, as has been declared by that court again and again was, that such grants shall operate at a fixed time, and shall take only such lands as at that time are public lands."

The case is controlled by another decision of this Court, *Wisconsin Central Railroad Company v. Forsythe*, 159 U. S. 46.

In that case the Wisconsin Central Railroad Company brought an action to recover a piece of land which lay within its ten-mile or granted limits, relying on a grant by the United States to the state of Wisconsin for its benefit by an Act approved May 5, 1864. It was urged as a defense to this action that on May 5, 1864, the land in question had been withdrawn by the land department in 1856 and 1859 to satisfy the previous grant made to the state of Wisconsin by Act of June 3, 1856, the benefits of which had been conferred by the state on the Omaha company. The court held, however, because the grant for the benefit of the Omaha company by the act of 1856 and the grant for the Wisconsin Central company by the act of 1864 had both been made to the state of Wisconsin, and inasmuch as the withdrawal of lands within the indemnity limits of the Omaha grant, which conflicted with the subsequent place grant for the benefit of the Cen-

ents were delivered May 23 and 27, 1895 (Transcript, pp. 135-6), and the lands lie in the state of Washington north of Portland in the state of Oregon. In the Circuit Court the decision was in favor of the validity of the patents and the suit was dismissed (Transcript, p. 144). The United States appealed and the Circuit Court of Appeals certified three questions (Transcript, pp. 166-7). This court upon motion of all the parties, granted a *certiorari* bringing up the entire record.

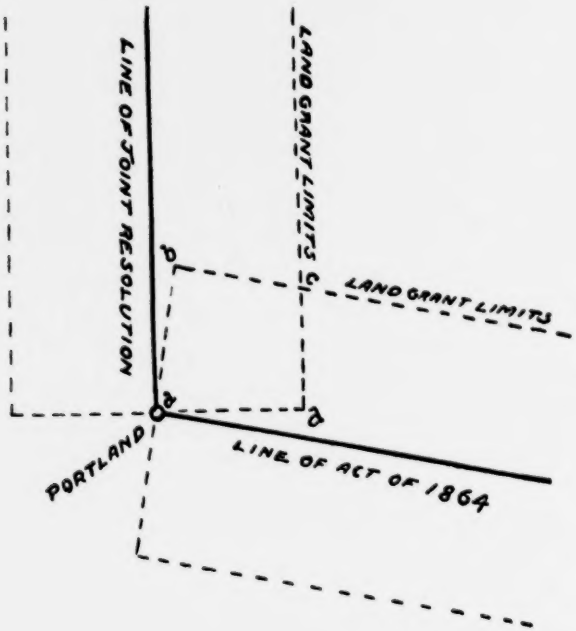
The facts were stipulated (Transcript, pp. 76-137) and are not complicated.

The Act of Congress July 2, 1864 (13 Stat. 365), granted lands to the Northern Pacific Rail*road* Company to aid in the construction of a railway from Lake Superior to some point on Puget Sound, with a branch *via* the valley of the Columbia river to a point at or near Portland in Oregon.

A Joint Resolution of Congress May 31, 1870 (16 Stat. 378), made an additional similar grant of lands to the same company for a line from a point at or near Portland to Puget Sound. By the Joint Resolution the line *via* Portland was designated as the *main* line and the line across the Cascade mountains as the *branch; U. S. v. N. P. Railroad Company*, 152 U. S. 284, 296.

The line east of Portland provided for in the Act of 1864 formed nearly a right angle at Portland with the line from there to Puget Sound provided for in the additional grant of 1870. For that rea-

son the two grants overlapped north of Portland as illustrated in the following diagram:



The "Overlap" in the foregoing diagram is the area included within lines ab-bc-cd and da. It contains the lands in suit.

The controversy grows out of the fact that while the line down the Columbia from Wallula to Portland described in the Act of 1864 was never built and the grant appertaining to the same was forfeited by Act of Congress September 29, 1890 (26 Stat. 496), the line from Portland to Puget Sound and thence east across the Cascade mountains was built and the grants appertaining thereto were earned.

Supreme Court of the United States.

No. 145.—October Term, 1903.

The United States, Petitioner, vs. The Northern Pacific Railroad Company and The Northern Pacific Railway Company.	On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 23, 1904.]

This was a suit brought by the United States against the Northern Pacific Railroad Company and the Northern Pacific Railway Company to cancel patents issued in May, 1895, by the United States to the railroad company, to whose rights the railway company had succeeded. The lands are situated in the State of Washington, north of Portland, in the State of Oregon. The case was heard in the Circuit Court on facts stipulated and the bill dismissed, whereupon it was carried to the Circuit Court of Appeals for the Ninth Circuit, and that court certified to this court certain questions on which it desired instructions. The whole record and cause were then required to be sent up for consideration.

Mr. Chief Justice Fuller delivered the opinion of the Court:

By the act of Congress of July 2, 1864, (13 Stat. 365, c. 217,) a grant was made to the Northern Pacific Railroad Company in aid of the construction of a railway from Lake Superior to some point on Puget Sound, with a branch *via* the Columbia River to a point at or near Portland, Oregon, of lands to which "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims, or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office."

On May 31, 1870, Congress passed a joint resolution making an additional grant to the same company for the location and construction of "its main road to some point on Puget Sound *via* the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound." 16 Stat. 378.

The line east of Portland provided for in the act of 1864 formed nearly a right angle at Portland with the line from there to Puget Sound pro-

vided for in the joint resolution, and thus the two grants overlapped, and the lands in suit fell within the overlap.

But the line down the Columbia from Wallula to Portland was never built and the grant was forfeited September 29, 1890, (26 Stat. 496, c. 1040,) while the line from Portland to Puget Sound and east across the Cascade Mountains was built and the grants earned.

Holding that the lands in the overlap passed to the company under the resolution of 1870, the Interior Department patented those in question to the railroad company, but afterwards, and on July 18, 1895, it was held that the lands did not pass under that grant, because at its date they were reserved or appropriated under the grant of 1864 to the same company. 21 L. D. 57.

That grant did not in terms reserve the lands, and the question would seem to be whether the line down the Columbia from Wallula to Portland had been definitely located May 31, 1870, since it is settled that the act of 1864 did not take any lands out of the power of disposition of Congress until the line of road was definitely located by maps duly filed as required. *Northern Pacific R. R. Co.* v. *Sanders*, 166 U. S. 620; *United States* v. *Oregon & California R. R. Co.*, 176 U. S. 28. The argument that the topography of the country between Wallula and Portland was such that the lands necessarily fell within the boundaries of that grant is without merit, for it cannot be assumed that Congress intended itself to definitely locate that part of the line in view of the language used and the settled law on the subject.

And it does not appear that any portion of the line from Wallula to Portland was ever definitely located, but it does appear that the line from Portland to Puget Sound was definitely located under the resolution of May 31, 1870, in part September 13, 1873, and the remainder September 22, 1882; that the road was completed as located, and was accepted by the government.

It is true that, March 6, 1865, Josiah Perham, then president of the Northern Pacific Company, transmitted to the Secretary of the Interior a map of the general line of the road, which the Secretary transmitted to the Commissioner of the General Land Office, with the recommendation that the lands along the line indicated be withdrawn. But the Commissioner protested against the acceptance of the map, and his letter to the Secretary, giving his reasons, bears an endorsement in pencil to the effect that the refusal to accept was sustained by the Secretary.

The by-laws of the company showed no authority in its president to locate the line, and its records, up to May 18, 1865, showed no action conferring such authority. No withdrawals were made under the alleged map.

In *United States* v. *Oregon & California R. R. Co.*, *supra*, it was held that if the Perham map were valid as a map of general route, it did

not operate as a reservation, and in *Doherty* v. *Northern Pacific Railway Company*, 177 U. S. 421, it was referred to as if not constituting a location even of the general route. It was not authorized by the company, was not accepted by the Department, and was practically worthless.

It is also true that on July 30, 1870, two maps of general route were transmitted to the Secretary, one of them showing a line extending from the mouth of the Montreal River, Wisconsin, to a point at the mouth of the Walla Walla River in Washington; and the other from the mouth of the Walla Walla, extending down the valley of the Columbia River to a point near Portland, and thence northerly to a point on Puget Sound. Withdrawals along the route so designated were directed, and so far as the line from Portland to Puget Sound was concerned the withdrawals must have been under the resolution. And the lands in suit are opposite to that part of the line.

The Circuit Court of Appeals in its certificate states that it appears to that court "that the case presents issues and facts identical with those which were involved in the case of the *United States* v. *The Oregon & California Railroad Company*, decided by the Supreme Court of the United States and reported in 176 U. S. 28, with this difference, that the defendant, the Northern Pacific Railroad Company, is the grantee of both the grants of land, the overlapping portions of which are the subject of the controversy herein, and that this case is ruled by the decision of the Supreme Court in the case above referred to, unless the fact that the Northern Pacific Railroad Company, by reason of being the grantee of both said land grants, is estopped to question the sufficiency of its own maps to designate the boundaries of its grant by virtue of the act of July 2, 1864."

The contention in the case thus referred to was that the lands there in controversy, which had been patented to the Oregon and California Railroad Company, were reserved and appropriated for the benefit of the Northern Pacific Railroad Company under the act of July 2, 1864, and by reason of the filing of the Perham map. By the act of July 25, 1866, Congress made a grant of lands in aid of the construction of a railroad and telegraph line between Portland, Oregon, and the Central Pacific Railroad in California. That grant was in the usual terms employed in such acts. Subsequently the benefit of the grant as to that part of the road to be constructed in Oregon was conferred upon the Oregon Central Railroad Company. The lands in dispute, whether place or indemnity, were within the limits of the grant of 1866. The entire line of road of the Oregon and California Railroad Company, which was the successor of the Oregon Central Railroad Company, was fully constructed and duly accepted by the president, and at the time the suit was begun was being operated and had been continuously operated by that company. The Oregon company filed its map of definite location in 1870, and it was accepted by the Land

Department. There was no withdrawal of indemnity lands on the proposed line of the Northern Pacific Railroad Company between Wallula and Portland, nor was there any definite location or construction of its road opposite to the lands in suit. The forfeiture act was passed September 29, 1890. It was held that nothing in the act of 1864 stood in the way of Congress subsequently granting to other railroad corporations the privilege of earning any lands that might be embraced within the general route of the Northern Pacific Railroad; and that, as the grant contained in that act did not include any lands that had been reserved or appropriated at the time the line of the Northern Pacific Railroad was definitely fixed, which it had not been at the time the act of July 25, 1866, was passed, or when the line of the Oregon company was definitely located; as the lands in dispute were within the limits of the grant contained in the act of 1866, and the road of the Oregon railroad was definitely fixed at least as early as January 29, 1870, the Northern Pacific Railroad Company having done nothing prior to the latter date, except to file the Perham map of 1865, which map was not one of definite location and was not accepted; and as, prior to the forfeiture act of September 29, 1890, there had not been any definite location of the Northern Pacific Railroad opposite the lands in dispute, there was no escape from the conclusion that the lands were lawfully earned by the Oregon company and were rightfully patented to it.

We do not think the fact that the Northern Pacific Company was the grantee in both grants limits the force of this decision. The resolution of 1870 and the act of July 2, 1864, were *in pari materia*, and no reason is perceived for holding that the act operated to exclude from the subsequent grant by the resolution.

In *Wisconsin Central Railroad Company* v. *Forsythe*, 159 U. S. 46, two grants had been made to the State of Wisconsin, in 1856 and 1864, for the benefit of two railroad companies, and there had been a withdrawal of indemnity lands of the one grant, which conflicted with the subsequent place grant, and we held that as both grants were to the State, although one grant had been conferred on one company, and the other on another, the lands in dispute were not excepted from the later grant; and Mr. Justice Brewer, speaking for the court, said: "For whose benefit was the withdrawal of the lands within the indemnity limits of the Bayfield road made? Obviously, as often declared, for the benefit of the grantee. It is as though the United States had said to the grantee: we do not know whether, along the line of road, when you finally locate it, there will be six alternate sections free from any pre-emption or other claim, and, therefore, so situated that you may take title thereto, and so we will hold from sale or disposal to any one else an additional territory of nine miles on either side that within those nine miles you may select whatever lands

may be necessary to make the full quota of six sections per mile. When Congress, by a subsequent act, makes a new and absolute grant to the same grantee of lands thus held by the Government for the benefit of such grantee, upon what reasoning can it be said that such grant does not operate upon those lands?"

As to the maps of general route of July 30, 1870, they were filed two months after the date of the resolution, were not maps of definite location, and included the line authorized by the resolution. These lands were opposite to part of that line, and all the unappropriated odd sections so situated, within the prescribed limits, were granted.

The decree of the Circuit Court is *Affirmed.*

Mr. Justice McKenna took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.

tral Company, had been made for the benefit of the state, which was the grantee in both acts, that, although the grants had been divided and one conferred upon one company and the other upon another, the land in controversy could not be held to have been excepted from the later grant of 1864. The court said:

> "For whose benefit was the withdrawal of the lands within the indemnity limits of the Bayfield road made? Obviously, as often declared, for the benefit of the grantee. It is as though the United States had said to the grantee: We do not know whether, along the line of road, when you finally locate it, there will be six alternate sections free from any pre-emption or other claim, and, therefore, so situated that you may take title thereto, and so we will hold from sale or disposal to anyone else an additional territory of nine miles on either side that within those nine miles you may select whatever lands may be necessary to make the full quota of six sections per mile. When congress, by a subsequent act, makes a new and absolute grant to the same grantee of lands thus held by the government for the benefit of such grantee, upon what reasoning can it be said that such grant does not operate upon those lands?"

It is manifest that the Joint Resolution of May 31, 1870, conferring the grant of lands for the line of road from Portland to Puget Sound, is amendatory of and *in pari materia* with the Act of July 2, 1864. A withdrawal or appropriation of lands for the benefit of the Northern Pacific Company under the original Act would not defeat the grant as enlarged and extended by the Joint Resolution; because the proposition can not be maintained, that by prior

reservation in favor of a railroad company land is excepted from the operation of a subsequent grant to *the same company*.

It is obvious that the general route map of July 30, 1870, cuts no figure in the case, for two reasons. First, it could not operate as an appropriation existing at the date of the Joint Resolution, for it was filed afterwards. Second, any withdrawal under that map would be a withdrawal as much under the Joint Resolution as under the act of 1864, because the map shows one line continuous from Wallula to a point at or near Portland and thence northwardly to Puget Sound. The line from Portland to Puget Sound, as before stated, was not authorized by, or mentioned in, the act of 1864.

If we are correct up to this point, the case is ended and little need be said of the three questions stated in the certificate of the Circuit Court of Appeals (Transcript, p. 167).

If the Perham map was no map, because unauthorized by the company and because rejected by the Government, it could not estop anybody. The general route map of July 30, 1870, cannot affect the rights of the company in this case by estoppel or otherwise, because, first, it was a map only of *general* route, and the law did not attach the rights of the company to any land or set aside any land for the company until the map of *definite* location was filed. Second, because the general route map was a map of the line authorized by the Joint Resolution (as well as of the line authorized by the act

of 1864) and the lands in suit are opposite that part of the line authorized by the Joint Resolution.

To the third question certified by the court, the case of *Wisconsin Central R. Company v. Forsythe*, *supra*, is a complete answer. The Joint Resolution of 1870 grants not *part* of, but *all* the unappropriated odd sections opposite the line authorized by that resolution and within the prescribed limits. Whatever argument might have been made, that it would not be held the intent of Congress to include within the grant of the Joint Resolution, lands situate like these, if the prior grant had been made to another company, that argument utterly fails when it is considered that the same company was grantee in both acts. As the Court said in the *Forsythe Case*, "upon what reasoning can it be said that such grant does not operate upon those lands"?

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